87-950

Supreme Court, U.S.
FILED
DEC 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

RED LAKE BAND OF CHIPPEWA INDIANS, et al.
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

TERENCE L. THATCHER
Counsel of Record

M. FRANCES AYER
PIRTLE, MORISSET, SCHLOSSER & AYER
1000 Second Avenue, Suite 1500
Seattle, Washington 98104-1046
(206) 386-5200
Attorneys for Petitioners Red Lake Band of Chippewa Indians, et al

Of Counsel:

JAMES F. BODIN
Edwards, Edwards & Bodin
312 Alworth Building
Duluth, Minnesota 55802
(218) 727-7431

QUESTIONS PRESENTED

1) Whether federal courts should have referred to tribal court for resolution a suit by the United States against an Indian tribe seeking to enforce a federal records law?

2) Whether an Indian reservation court, organized and funded pursuant to 25 C.F.R. Part 11, but enforcing a tribal law and order code, is an arm of the tribe, making its records tribal records, or an arm of the federal government, making its records federal records?

3) Whether an Indian tribe enjoys sovereign immunity from suit brought by the United States government?

PARTIES TO THE PROCEEDING SOUGHT TO BE REVIEWED

United States of America

Red Lake Band of Chippewa Indians

Red Lake Tribal Council and its members:

Roger Jourdin, Chairman

Royce Graves, Secretary

James Strong, Treasurer

Allen English, District Representative

Lawerence Bedeau, District Representative

George Jones, District Representative

Adolph Barrett, District Representative

Roman Stately, Jr., District Representative

Gerald Brun, District Representative

Dan Raincloud, Jr., District Representative

Tom Stillday, District Representative

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING SOUGHT TO BE REVIEWED ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 2

STATUTES AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 2

THE COURT OF APPEALS DECISION 6

REASONS FOR GRANTING THE WRIT 7

1. The District Court and Court Of Appeals Should Have Referred This Controversy To Tribal Court 9

2. The Court of Appeals Applied An Improper Standard In Determining That The Red Lake Court Records Were BIA Records Rather Than Records Of The Tribe 11

3. The Red Lake Band Of Chippewa Indians Is Immune From Suit 15

CONCLUSION 20

TABLE OF AUTHORITIES

Cases Page

Barta v. Oglala Sioux Tribe of Pine Ridge Reservation, 259 F.2d 553 (8th Cir. 1958) *cert. denied* 358 U.S. 932 (1959) 18

Bellotti v. Baird, 428 U.S. 132 (1976) 11

Bryan v. Itasca County, 426 U.S. 373 (1976) 3, 8

Cherokee Nation v. Georgia, 30 U.S. 1 (1831) 18

Chisholm v. Georgia, 2 U.S. 419 (1793) 19

Federal Land Bank of Omaha v. Reeves, ___ F. Supp.___, 14 ILR 3071 (D.S.D. 1987) 10

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) 19

Iowa Mutual Insurance Co. v. LaPlante, ___ U.S. ___, 107 S. Ct. 971 (1987) 8, 9, 10, 11

Jones v. Meehan, 175 U.S. 1 (1899) 18

Kessler v. Strecker, 307 U.S. 22 (1939) 11

Leiter Minerals v. United States, 352 U.S. 220 (1957) 11

Menominee Tribe v. United States, 391 U.S. 404 (19680 18

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 18

Mescalero Apache Tribe v. Jones,
411 U.S. 145 (1973) 15

National Farmer's Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985) 9, 10, 11

Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959) 18

New Mexico v. Mescalero Apache Tribe
462 U.S. 324 (1983) 8

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 17

Organized Village of Kake v. Egan
369 U.S. 60 (1962) 14

R.J. Williams v. Fort Belknap Housing Authority, 719 F.2d 979 (9th Cir. 1983) 10

Santa Clara Pueblo v. Martinez,
436 U.S. 49 (1978) 8, 16, 19

Sibbach v. Wilson & Co.,
312 U.S. 1 (1941) 11

Talton v. Mayes,
163 U.S. 376 (1896) 13

United States v. Clapox,
35 F. 575 (D. Or. 1888) 14

United States v. Kagama,
118 U.S. 375 (1886) 13, 18

United States v. King,
395 U.S. 1 (1969) 16

United States v. Ohio,
614 F.2d 101 (6th Cir. 1979) 11

United States v. Mazurie,
419 U.S. 544 (1975) 8, 16

United States v. Mississippi,
380 U.S. 128 (1965) 6, 19

United States v. Testan,
424 U.S. 392 (1976) 16

United States v. Texas,
143 U.S. 621 (1892) 19

United States v. United States Fidelity Guarantee Company,
309 U.S. 506 (1940) 16, 17, 18

United States ex rel. Kishell v. Turtle Mountain Housing Authority,
816 F.2d 1273 (8th Cir. 1987) 10

United States v. Yakima Tribal Court,
806 F.2d 853 (9th Cir. 1986) *cert. denied*
___ U.S. ___, 107 S. Ct. 2461 (1987) 6,16

United States v. Wheeler,
435 U.S. 313 (1978) ..... *passim*

United States v. White Mountain Apache Tribe, 784 F.2d 917 (9th Cir. 1986) 6, 16

Washington v. Confederated Tribes of Colville, 447 U.S. 134 (1980) 6, 17

Washington v. Passenger Fishing Vessel Ass'n., 443 U.S. 658 (1979) 18

Wellman v. Chevron, U.S.A.,
815 F.2d 577 (9th Cir. 1987) 10

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 7, 16

Williams v. Lee,
358 U.S. 217 (1959) 8

Worcester v. Georgia,
31 U.S. 515 (1832) 15, 17, 19

Wounded Head v. Tribal Council of Oglala Sioux Tribe, 507 F.2d 1079
(8th Cir. 1975) 18

Treaties and Statutes Page

Treaty of Old Crossing,
13 Stat. 667 2

Supplement to Treaty of Old Crossing,
13 Stat. 689 2

Federal Records Act, 44 U.S.C.
§§ 3106, 3301 ..... 2, 5, 15

Indian Reorganization Act,
25 U.S.C. § 461, *et seq.* 7, 12

5 U.S.C. § 551(h) 4

5 U.S.C. § 552 4

25 U.S.C. § 2 14

5 U.S.C. § 9 14

25 U.S.C. § 200 14

25 U.S.C. § 1302(7) 14

28 U.S.C. § 1152(a), P.L. 83-280 3

28 U.S.C. § 1254(1) 2

41 U.S.C. § 252(c) 4

Regulations

25 C.F.R. Part 11 ..... 2, 3, 7

25 C.F.R. § 11.1(a)(6) 12

25 C.F.R. § 11.3 3

25 C.F.R. § 11.4(d) 12

25 C.F.R. § 11.11 14

25 C.F.R. § 11.22 10

25 C.F.R. §§ 11.38-11.98 ME 4

Other Page

Felix S. Cohen's *Handbook of Federal Indian Law* (1982 Edition, R. Strickland, ed.) at 332-335 3

II Kappler, *Indian Affairs, Laws and Treaties* (1904) at 853-855, 861-862) 2

Op. Sol. Int., October 25, 1934 (Powers of Indian Tribes), 55 I.D. 14..... 13

Tribe, "Intergovernmental Immunities In Litigation, Taxation, and Regulation: Separation of Powers Issues In Controversies About Federalism," 89 Harv. L.R. 682 (1976) 19

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

No. 87 -

RED LAKE BAND OF CHIPPEWA INDIANS, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Red Lake Band of the Chippewa Indians hereby petitions this Court for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit to review the appeal court's decision in the case of *United States of America v. Red Lake Band of Chippewa Indians*, No. 86-5453 MN.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit of which review is sought is reported at 827 F.2d 380 (1987). The Opinion is reproduced in

the Appendix at App. 2. The district court opinion affirmed by the Eighth Circuit is reproduced at App. 10.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit is dated August 31, 1987. A timely petition for rehearing was filed by the Red Lake Band of Chippewa Indians. That petition was denied on September 28, 1987. App. 1. This Court has jurisdiction to review the judgment below pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves a consideration of the primary jurisdiction of tribal courts, the doctrine of sovereign immunity, and the rights of self-government enjoyed by Indian tribes of the United States. The case also requires consideration of the Federal Records Act, 44 U.S.C. § 3106, 3301, and certain regulations of the Bureau of Indian Affairs, 25 C.F.R. Part 11. *See* App. 24 and App. 26.

STATEMENT OF THE CASE

The Red Lake Band of Chippewa Indians (hereinafter either the Red Lakes or the Tribe) is a federally-recognized Indian tribe. The Tribe signed treaties of peace with the United States in 1863, 13 Stat. 667, and 1864, 13 Stat. 689; (compiled in II Kappler, *Indian Affairs, Laws and Treaties*, (1904) at 853-855, 861-862). The Red Lakes live on the Red Lake Reservation which covers approximately 637,000 acres of Northern Minnesota.

The Tribe operates as a sovereign government pursuant to a Constitution ratified by the Tribe's members and approved by the Secretary of the Interior on November 10, 1958. That Constitution, among other things, grants the Tribal Council authority "to enact ordinances . . . provid-

ing for the maintenance of law and order and the administration of justice by establishing a police force and a tribal court and defining their powers and duties . . . ." Revised Constitution and By-Laws of the Red Lake Band of Chippewa Indians, Art. VI, 5.

As early as February 15, 1952, the Secretary of the Interior approved a tribal law and order code establishing the criminal rules of conduct for the Red Lake Reservation. *See*, Exhibit F, Supplemental Court of Appeals Record. In subsequent amendments through the years, the Tribe established rules of criminal procedure for the reservation court that enforces that law and order code and continued to update the code's definition of offenses, as necessary. In light of the successful operation of a justice system on the Red Lake Reservation, Congress explicitly exempted that Reservation from operation of P.L. 83-280 when it granted the State of Minnesota criminal jurisdiction over all other Indian reservations in that state. 28 U.S.C. § 1152(a). *See, Bryan v. Itasca County*, 426 U.S. 373, 385 (1976).

In the 19th Century the Bureau of Indian Affairs began to establish courts on certain Indian reservations, typically called Courts of Indian Offenses, to handle prosecutions against on-reservation criminal activity by Indians. *See* generally, Felix S. Cohen's *Handbook of Federal Indian Law*, (1982 Edition, R. Strickland, ed.) at 332-335. These courts are often known as CFR courts, for the rules establishing them are now codified in 25 C.F.R. Part 11. Those rules set up the procedures whereby judges of the courts are appointed and by which court proceedings are conducted. Judges, for instance, are appointed by the Bureau of Indian Affairs, and paid by the Bureau of Indian Affairs (BIA), but are subject to the approval or veto of the Reservation Tribal Council. 25 CFR § 11.3. The rules also define the elements of the

criminal offenses alleged violations of which are prosecuted before the courts. 25 CFR §§ 11.38-11.98ME.

At the time the controversy involved in this case arose, the court on the Red Lake Reservation was funded and organized through the CFR mechanism. On the other hand, the Red Lake Court did not enforce the CFR list of offenses. Instead, it enforced -- and still enforces -- criminal ordinances enacted by the Tribe itself.[1]

On August 29, 1985, the Red Lake Tribal Council passed an ordinance declaring that "all Red Lake Court of Indian Offenses case records shall be kept confidential by the Court and the information contained in the case records shall be withheld from public disclosure." Red Lake Tribal Council Ordinance #1-85. On the same date, through Resolution No. 234-85, the Tribal Council ordered that the case records of all closed cases of the Red Lake Court be transferred to the Tribal archives and kept confidential. The records were accordingly transferred on August 30, 1985.[2]

On September 17, 1985 the BIA demanded by letter to the Tribal Council that it relinquish the records of all closed cases of the Red Lake Court. When the records were not released, the United States brought an action in

---

1 The Red Lake court is now funded through a grant under P.L. 93-638, 41 U.S.C. § 252(c), rather than through the CFR mechanism.

2 The Tribal Council action was taken in response to a concern that the records would be made available by the BIA to a non-Indian, non-reservation newspaper that had filed an FOIA request with the BIA for the records. The FOIA, of course, does not apply to Indian Tribes. As self-governing societies they reserve the right to handle their governmental documents as they themselves determine. *See*, 5 U.S.C. §§ 551(h), 552.

the United States district court for the district of Minnesota for recovery of the records pursuant to 44 U.S.C. §§ 3106 and 3301, the Federal Records Act.

On cross motions for summary judgment, the district court ruled in favor of the government and ordered release of the records. The district court rejected the Tribe's assertion that its sovereign immunity protected it from suit by the federal government absent an explicit Congressional authorization. The district court also held that the records at issue were records of the United States and that their deposit into Red Lake archives and the Tribe's refusal to reveal them constituted a violation of 44 U.S.C. § 3106. The court then directed that the records be turned over to the BIA, but stayed its own order pending appeal to the Eighth Circuit court of appeals. On appeal, the court of appeals generally affirmed the district court's ruling.

The Tribe also argued before the district court that summary judgment should not be granted because there remained a genuine dispute of fact as to the nature of the Red Lake Band's organizational structure and thus, the nature of the Red Lake Court. The district court determined that there was no genuine dispute and ruled on the motions for summary judgment.[3] The Tribe before this Court does not reassert the existence of a genuine dispute. The nature of the Red Lake Court is at issue, but the resolution of that issue involves a legal determination that can be made on the facts in the record.

---

3 The Tribe's cross-motion for summary judgment was filed in an effort to protect its interests if the district court determined, as it ultimately did, that there was no genuine factual dispute.

THE COURT OF APPEALS DECISION

In ruling on the Red Lake's appeal from the district court's judgment, the court of appeals considered the Tribe's two primary arguments. Those were: (1) the Tribe is exempt from suit under the doctrine of sovereign immunity and (2) the Red Lake Court is, in substance, a tribal court, functioning as an exercise of tribal sovereignty and its records, therefore, are tribal, not BIA, records.

With respect to the Tribe's assertion of sovereign immunity, the court of appeals acknowledged the general rule that tribes are protected from suit unless there is an explicit waiver of that immunity by Congress. But the court went on to hold, relying on two Ninth Circuit cases, *United States v. White Mountain Apache Tribe*, 784 F.2d 917 (9th Cir. 1986) and *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986), *cert. denied* ___ U.S. _____, 107 S. Ct. 2461 (1987), that the Tribe's sovereign immunity does not foreclose lawsuits brought by the United States. The court so ruled on essentially two grounds. First, it said that "it is an inherent implication of the superior power exercised by the United States over the Indian tribes that a tribe may not interpose its sovereign immunity against the United States." 827 F.2d at 382. It concluded this loss of sovereign immunity was a "necessary implication of [the Indians'] . . . dependant status," citing *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 152 (1980), and arose even without Congressional action. Second, the court announced that for purposes of this case, tribes were analogous to states. Having so concluded, the court then relied on the case of *United States v. Mississippi*, 380 U.S. 128 (1965), to hold that "just as a state may not assert sovereign immunity as against the federal

government . . . neither may an Indian tribe . . . ." 827 F.2d at 383.

With respect to the Red Lake's second main argument (that the records of the Red Lake Court were tribal records) the Eighth Circuit held, without analysis, that as the records were those of a "CFR court," the documents were, *ipso facto*, BIA records. In so holding, the court relied upon its interpretation of Department of the Interior regulations, 25 C.F.R. Part 11, but did not look past those regulations to the Red Lake Court's "ultimate source of . . . power." *United States v. Wheeler*, 435 U.S. 313, 320 (1978). The court went on to consider whether, pursuant to the regulations, a tribe utilizing the CFR-funding mechanism could nevertheless exempt itself from certain of the regulations, including those related to record-keeping. On this point, the court decided that a tribe "organized" under the Indian Reorganization Act, 25 U.S.C. § 461 et seq., which uses "CFR courts", can exempt the court from the bulk of the CFR regulations and make it an "independent tribal court" by enacting a tribal law and order code. 827 F.2d at 382. On the other hand, the court said, if a federally-recognized tribe that has not "organized" itself under the IRA uses a CFR court, it cannot similarly exempt itself from the CFR rules by enacting a law-and-order code. The court of appeals then held that the Red Lake Band had not presented evidence that it met the criteria for "exemption," for it had not shown it was "organized" under the IRA.

REASONS FOR GRANTING THE WRIT

This Court has repeatedly noted that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142

BEST AV

(1980) quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975). The Court has also consistently interpreted federal law in a manner most likely to aid in achieving the federal government's "goal of promoting tribal self-government, a goal embodied in numerous federal statutes [fn. omitted]." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983). The Court has reiterated that any restrictions on that right should generally be found only where there is a clear and unequivocal announcement by Congress of the intent to do so. *See e.g. Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978); *Bryan v. Itasca County, supra* 426 U.S. at 392-393.

In this case, the Eighth Circuit has ignored these basic tenets of federal Indian law. On the question of sovereign immunity, the court of appeals found a loss of this fundamental component of Indian sovereignty in the absence of explicit Congressional action. Such an implied divestiture of right is neither justified as a matter of law nor necessary as a matter of policy. The net effect is to permit a central element of tribal sovereignty to be lost at the whim of executive branch officers simply by their decision to file a lawsuit. Next, judging the nature of the Red Lake Court and its records, the Eighth Circuit focused on form rather than the substance, contrary to this Court's direction in *United States v. Wheeler, supra*. In so doing, and in declaring, against all logic, that a court enforcing tribal law is not a tribal court, the Eighth Circuit cut deeply into the Red Lake Band's sovereign authority "to make . . . [its] own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). And finally, the court of appeals overlooked this Court's recent affirmations of the primary importance of tribal courts in protecting tribal self-government. *Iowa Mutual Insurance Co. v. LaPlante*, ___ U.S. ___, 107 S. Ct. 971 (1987), *National Farmer's Union Ins. Cos. v.*

AILABLE COPY

Crow Tribe, 471 U.S. 845 (1985). It thus permitted the exercise of federal court jurisdiction over a controversy that should first has been referred to the tribal court itself.

In *United States v. Wheeler*, *supra*, this Court reserved the question of "[w]hether . . . a [CFR] court is an arm of the federal government or, like the Navajo Tribal Court, derives its powers from the inherent sovereignty of the Tribe." 435 U.S. at 427 n. 26. That question, and the implications of its answer, are squarely presented here. The Eighth Circuit answered it in a way contrary to the clear direction of this Court's rulings on tribal sovereignty and self-government. Though this case involves but one court on one reservation, it necessarily implicates all CFR courts throughout the country and raises decidedly important questions of federal Indian law which should be settled by this court. *See* Rule 17.1(c), S. Ct. Rules.

1. The District Court and Court Of Appeals Should Have Referred This Controversy To Tribal Court

The district court and court or appeals committed a fundamental error when they heard this case. They should, instead, have referred the controversy to tribal court for resolution. In two recent cases, this Court has made clear that controversies between Indians and non-Indians involving reservation affairs should be resolved, in the first instance at least, in the reservation court. *See, National Farmers Union Ins. Cos. v. Crow Tribe, supra*, and *Iowa Mutual Insurance Co. v. La Plante, supra*. In each case, the Court directed that the federal court stay its review of tribal court jurisdictional issues until the tribal court had determined to accept or reject its own jurisdiction over the matter. Here, although the issues

to be decided are not jurisdictional in the same sense, the same deference to tribal court decisions should nevertheless prevail. Otherwise, the "exercise of jurisdiction [by a federal court] over matters relating to reservation affairs can . . . impair the authority of tribal courts," *Iowa Mutual, supra*, 107 S. Ct. at 976. If the Red Lake Band is subject to suit at all, a matter discussed below, it should, at least, only be so in its own tribal court.

The lower courts -- including the Eighth Circuit -- have so understood the broad teaching of *National Farmers Union* and *Iowa Mutual*: tribal courts, not federal courts, should resolve controversies arising on a reservation. *See, United States ex rel. Kishell v. Turtle Mountain Housing Authority*, 816 F.2d 1273 (8th Cir. 1987) (suit by Indian against non-Indian corporation should be brought in tribal court, not U.S. District Court); *Wellman v. Chevron, U.S.A.*, 815 F.2d 577 (9th Cir. 1987) (same). When a non-Indian sues an Indian for activities occurring on the reservation, the cause of action should be heard in tribal court. *Federal Land Bank of Omaha, v. Reeves*, ____ F. Supp. ____, 14 ILR 3071 (D.S.D. 1987). *See* also, *R.J. Williams v. Fort Belknap Housing Authority*, 719 F.2d 979 (9th Cir. 1983) ("the tribal court is generally the exclusive forum for the adjudication of disputes affecting the interests of both Indians and non-Indians which arise on the reservation.")[4] It makes no difference that the plaintiff is the United

---

4 Interestingly, the rules that the United States says govern the Red Lake Court expressly grant the court jurisdiction over "all suits wherein the defendant is a member of the tribe . . . within [its] jurisdiction . . . ." 25 C.F.R. § 11.22. Here, individual tribal council members were named as additional defendants. Thus, the federal government's own regulations lead to the conclusion the Tribe urges here.

States itself. Suits by the United States are typically subject to the federal doctrine of abstention, to which the Court has analogized deference to tribal courts. *See, Leiter Minerals v. United States,* 352 U.S. 220 (1957); *United States v. Ohio*, 614 F.2d 101 (6th Cir. 1979). It is, moreover, United States policy to encourage the development of tribal self-government in which "tribal courts play a vital role . . . ." *Iowa Mutual, supra*, 107 S. Ct. at 976.

The federal courts in this case should have dismissed the case or stayed action on the complaint so that the issues could be presented first for tribal court review.[5]

2. The Court of Appeals Applied An Improper Standard In Determining That The Red Lake Court Records Were BIA Records Rather Than Records Of The Tribe

The court of appeals had before it the question whether the records of the Red Lake Court are records of a federal agency or of a separate sovereign, that is, the Red Lake Band of Chippewa Indians. To answer that question, the court should necessarily have grappled with the question left open in *United States v. Wheeler, supra*: Whether a court funded and generally organized

---

5 This quasi-jurisdictional issue was not raised below. That does not deny this Court the power to consider it. This Court may review "fundamental errors" by lower courts, even if not previously asserted by a party. *See, Sibbach v. Wilson & Co.*, 312 U.S. 1, 16 (1941); *Kessler v. Strecker*, 307 U.S. 22, 34 (1939). As well, this Court has drawn an analogy between the deference to tribal courts announced in *National Farmers Union, supra,* and *Iowa Mutual, supra,* and the more traditional abstention doctrine. *See, Iowa Mutual Insurance Co. v. LaPlante, supra*, 107 S. Ct. at 976 n. 8. This Court may, *sua sponte*, raise and resolve abstention issues not raised below. *Bellotti v. Baird*, 428 U.S. 132, 143, n. 10 (1976).

under the Code of Federal Regulations, but which enforces tribal law, acts as an arm of the federal government or as an arm of the separate tribal sovereignty.

But, in answering this question, the Eighth Circuit simply announced, without analysis, that "the records of C.F.R. courts are agency records and belong to the United States." 827 F.2d at 383. The court noted that the Red Lake Band is listed in the regulations as one of those tribes to whom the regulations generally apply, 25 C.F.R. § 11.1(a)(6), and concluded that "designated tribal courts are presumptively CFR courts". 827 F.2d at 383.[6]

The teaching of this Court in *United States v. Wheeler, supra*, however, makes it clear that such a superficial analysis cannot satisfactorily fix the underlying status of a tribal court. In that case, too, the question of double jeopardy turned on whether a tribal court, there a court organized by the Navajo Tribe, was an "arm of the federal government." 435 U.S. at 319. In making that judgment, the Court noted that the critical issue is "not the extent of control exercised by one prosecuting authority over the other, but rather the *ultimate source of the power* under which the respective prosecutions were undertaken." 435 U.S. at 320. (emphasis added) "That Congress has in certain ways regulated the manner and

---

6 Having so quickly decided the nature of the records at issue, the only question the court analyzed at all was whether the Redlake Band had exempted itself from the full reach of the regulations (including record keeping) by showing that (1) it was organized under the Indian Reorganization Act, 25 U.S.C. §. 461 et seq. and (2) it had adopted a tribal law and order code. *See* 25 C.F.R. §. 11.4(d). A regulatory exemption is beside the point, however, if the records are not the BIA's to regulate. In any case, the Redlake Band has clearly followed the record keeping requirements of the regulations themselves. *See* n.9, *infra*.

extent of the tribal power of self-government does not mean that Congress is the source of that power." *Id.* *See also, Talton v. Mayes*, 163 U.S. 376, 384 (1896).[7]

The Red Lake Court, even though its judges are paid by the BIA, nevertheless does not enforce *federal law*. It enforces a criminal code adopted by the Tribe itself. The "ultimate source" of the Red Lake Court's power is the sovereign power of the Red Lake Band of Chippewa Indians, "a separate people . . . regulating their internal and social relations." *United States v. Kagama*, 118 U.S. 375, 381-382 (1886), quoted in *United States v. Wheeler, supra*, 435 U.S. at 322, and the Red Lake court acts as an arm of the Red Lake Band.[8] Were it otherwise, then

---

7 The Eighth Circuit in this case had before it several pronouncements and letters from the Tribe itself asserting that the Red Lake Court was a "CFR Court," not a tribal court. Those declarations came in the context of a struggle over BIA funding of court operations. What the Tribe or its representative may have said about the nature of the Red Lake Court, in any case, is not determinative of the legal issue involved here. For purposes of funding, the Red Lake Court was a CFR court. That does not mean that when it enforces tribal law it is not an "arm of the Tribe."

8 In this case, the Red Lake's do not urge, and this Court need not reach if it accepts certiorari, the question of whether a *CFR court* enforcing *CFR offenses* is operating as an arm of the federal government or of the Tribe itself. It is worth noting, however, that if the CFR Courts do not represent an exercise of tribal sovereignty, then not only are subsequent federal prosecutions barred, but the legality of the CFR courts may be in question. The Interior Department Solicitor has suggested, for instance, that the "more satisfactory defense" of the legality of the CFR courts "is a doctrine . . . that the courts of Indian offenses derived their authority from the Tribe rather than from Washington." Op. Sol. Int. October 25, 1934 (Powers of Indian Tribes) 55 I.D. 14, reprinted in, 1 Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974, (Cont.)

prosecution in a CFR court enforcing tribal law, where punishments cannot exceed one year in jail, 25 U.S.C. § 1302(7), as amended by § 4217, P.L. 99-570, would foreclose later federal prosecutions where more severe sentences can be meted out, with predictable "undesirable consequences." *United States v. Wheeler, supra* 435 U.S. at 330.[9]

(n. 8 cont.)

at 445, 476. This more "satisfactory defense" is necessary because the Secretary has relied on 25 U.S.C. § 2 to provide authority to establish CFR courts to try persons for the violation of criminal offenses defined in the administrative regulations. There is reason to question the breadth of that authority. *E.g., Organized Village of Kake v. Egan*, 369 U.S. 60, 63 (1962) (declaring that 25 U.S.C. § 2 and § 9 do not provide "general power to make rules governing Indian conduct.") *But see United States v. Clapox*, 35 F. 575 (D. Or. 1888) (upholding legality of BIA courts).

9 The regulations themselves do not require the full records of the tribal court be made agency records or that they be turned over to the agency. If the records are not federal agency records, therefore, the regulations themselves do not compel a result favorable to the government. 25 C.F.R. § 11.11 requires, first, that a case record be kept available "for inspection by duly qualified officials . . . ." But the record need simply summarize the case and need not be released, simply available for review. 25 C.F.R. § 11.11 also requires that "a record of all proceedings shall be kept at the BIA agency office as required by 25 U.S.C. § 200." That law provides that "whenever an Indian shall be incarcerated in an Indian jail, or any other place of confinement, on an Indian reservation or in an Indian school, a report or record of the offense or case shall be immediately submitted to the superintendent of the reservation or such official or officials as he may designate and such reports shall be made part of the records of the agency office." The Red Lake Court does submit such a summary report whenever an Indian is incarcerated. *See* Page 24a of Addendum to Court of Appeals Opening Brief for (cont.)

BEST AVAIL

Subjected to the *Wheeler* analysis, the inapplicability of the Federal Records Act to this case becomes manifest. 44 U.S.C. § 3301 defines federal records to include materials "made or received by an agency of the United States under federal law or in connection with a transaction of public business . . . ." When it is enforcing the tribal law and order code, the Red Lake Court is not making or receiving documents "under federal law". It is making or receiving those documents under tribal law. Nor can it be said that it is transacting the "public business" of the United States government. It is, rather, conducting the business of a separate sovereign, the Red Lake Band of Chippewa Indians. Thus, the records of the Red Lake Court are tribal records, not subject to the control of the BIA, irrespective of the BIA's funding or administrative regulation of the Red Lake Court.

3. The Red Lake Band Of Chippewa Indians Is Immune From Suit

The separate and sovereign nature of American Indian tribes was first enunciated by Chief Justice Marshall in *Worcester v. Georgia*, 31 U.S. 515 (1832). Although the Supreme Court has departed from the "conceptual clarity of Mr. Chief Justice Marshall's view in *Worcester*," *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), the Court still hews to the determination that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." *White Mountain Apache Tribe v.*

(n. 9 cont.)

Appellants (December 31, 1986). What the Tribe seeks to protect are the detailed and complete court records -- such as hearing transcripts, etc.

ABLE COPY

Bracker, supra, 448 U.S. at 142, quoting *United States v. Mazurie,* 419 U.S. 544, 557 (1975). "[U]ntil Congress acts the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their independent status." *United States v. Wheeler, supra,* 435 U.S. at 323.

A fundamental element of tribal sovereignty is immunity from lawsuits absent Congressional authorization. *United States v. United States Fidelity Guarantee Company,* 309 U.S. 506, 513 (1940). That "immunity cannot be waived by [government] officials." *Id.* "[A] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed [by Congress].'" *Santa Clara Pueblo v. Martinez, supra,* 436 U.S. at 58 quoting *United States v. Testan,* 424 U.S. 392, 399 (1976), quoting *United States v. King,* 395 U.S. 1, 4 (1969).

The court of appeals acknowledged the clear statements by this Court upholding the sovereign immunity of American Indian tribes from suit. Relying, however, on two Ninth Circuit cases, *United States v. White Mountain Apache Tribe,* 794 F.2d 917, 920 (9th Cir. 1986) and *United States v. Yakima Tribal Court,* 806 F.2d 853, 861 (9th Cir. 1986) *cert. denied* ____ U.S. ____, 107 S. Ct. 2461 (1987), the court held nonetheless that a tribe's sovereign immunity did not protect it from suits by the United States, even without an explicit Congressional authorization. In so doing, the court of appeals misread this Court's precedents on tribal sovereignty and imported into federal Indian law inapplicable principles involving the sovereign powers of states of the Union.

The Eighth Circuit suggests that tribes have lost their sovereign immunity vis-a-vis the United States as "an inherent implication of the superior power exercised by the United States over the Indian tribes . . . ." 827 F.2d

at 381. In doing so the Court relied on this court's declaration in *Washington v. Confederated Tribes of Colville, supra*, that Indian tribes retain attributes of sovereignty unless they are divested by treaty, federal law, or "by necessary implication of their dependent status." *Id.*, 447 U.S. at 152 (citation omitted).

The Eighth Circuit has misunderstood this Court's analysis of the "necessary" restrictions on tribal sovereignty. As the Court explained it in *United States v. Wheeler, supra*, "[t]he areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and non-members of the Tribe." 435 U.S. at 326. Significantly, however, whatever other attributes of sovereignty are restricted when tribes deal with non-members, immunity from suit is not one of them. In fact, it is typically suits by non-members from which tribes *are* immune. *United States v. United States Fidelity Guarantee, supra.*

In any case, this lawsuit does not involve relations of the sort between a tribe and non-members explained by *Wheeler* and involved in, for instance, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Rather, the issue here involves the nature of the relationship between the Tribe and the United States government itself. That relationship is defined by the treaties between the two sovereigns and by the inherent trust relationship arising as a consequence. In that context, the words of Chief Justice Marshall still hold meaning: "A weak state [such as an Indian tribe] . . . may place itself under the protection of one more powerful without stripping itself of the right of government and *ceasing to be a state*." *Worcester v. Georgia, supra* 31 U.S. at 557 (emphasis added). Nothing in the treaties between the Red Lake Band and the United States evinces an intent by the

Tribe to relinquish its sovereign immunity. Ambiguities in an Indian treaty should be resolved in favor of the tribe. *See e.g., Washington v. Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 675-76 (1979); *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Jones v. Meehan*, 175 U.S. 1 (1899). *A fortiori*, "the proper inference from silence . . . is that the sovereign power . . . remains intact." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 n. 14 (1982).

Nor need a waiver of sovereign immunity against suits by the United States be implied to protect the government's interest. Congress can provide for such suits if it sees fit to do so. But under the Eighth Circuit's rule, Congress need never act. Under the Eighth Circuit's rule, the sovereign immunity of an Indian tribe can be waived by any officer of the United States government who has authority to file suit. This Court has acted in the past to protect Indian tribes from the exercise of that kind of administrative power, *see, United States v. United States Fidelity Guarantee, supra*, and should do so again.

The Eighth Circuit also erred in relying on cases from this Court permitting suits by the United States against individual states of the Union. From the very first, this Court has rejected the analogy between Indian tribes and individual states. *See e.g., Cherokee Nation v. Georgia*, 30 U.S. 1, 16, (1831); *United States v. Kagama, supra*, 118 U.S. at 381. Lower courts, including the Eighth Circuit itself, have also rejected attempts to compare Indian tribes to the states. *See Wounded Head v. Tribal Council of Oglala Sioux Tribe*, 507 F.2d 1079, 1081 (8th Cir. 1975); *Barta v. Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F.2d 553, 556 (8th Cir. 1958) *cert. denied* 358 U.S. 932 (1959); *Native American Church v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959).

In the context of a waiver of sovereign immunity the difference between the Indian tribes and the states is particularly compelling. This Court has held that by entering the Union, the states consented to suit by the sovereign thus created. *See United States v. Texas*, 143 U.S. 621, 12 S. Ct. 488, 494 (1892); cf. *Chisholm v. Georgia*, 2 U.S. 419 (1793). *See generally,* Tribe, "Intergovernmental Immunities In Litigation, Taxation, and Regulation: Separation of Powers Issues In Controversies About Federalism," 89 Harv. L.R. 682 (1976). Tribes did not, in the same way, consent to become part of the larger Union. Neither they nor their members ratified a constitution which subjected them to suit by the federal sovereign. Instead, they signed treaties with the United States, retaining their status as "distinct independent political communities . . . [and] their original natural rights," except as they ceded them to the United States in treaty or as the United States Congress explicitly acts to limit them. *Worcester v. Georgia, supra*, 31 U.S. at 560.

The Eighth Circuit's reliance on *United States v. Mississippi*, 380 U.S. 128 (1965), a case involving explicit Congressional statutes intended to enforce the Fifteenth Amendment, is particularly inapposite in this context. *Cf. Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (Congress may, in enforcing the Fourteenth Amendment, override state's Eleventh Amendment immunity from suit.) Here, the Tribe does not argue that its sovereign immunity cannot be waived by an explicit statement of the Congress. All the Tribe asks is that the Court again make it clear that the Tribe's sovereign immunity is not waived by implication, cannot be waived by executive branch officials, and can only be removed by an "unequivocally expressed" statement of Congress. *Santa Clara Pueblo v. Martinez, supra*, 436 U.S. at 58.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Terence L. Thatcher
Counsel of Record

Of Counsel:
JAMES. F. BODIN
Edwards, Edwards & Bodin
312 Alworth Bldg.
Duluth, MN 5802
(218) 727-7431

M. Frances Ayer
PIRTLE, MORISSET, SCHLOSSER & AYER
1000 Second Avenue, Suite 1500
Seattle, WA 98104-1046
(206) 386-5200

Attorneys for Petitioners
Red Lake Band of Chippewa Indians, et al.

December, 1987.

(2)

87-950

Supreme Court, U.S.
FILED
DEC 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

RED LAKE BAND OF CHIPPEWA INDIANS, et al.
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX

TERENCE L. THATCHER
Counsel of Record

M. FRANCES AYER
PIRTLE, MORISSET, SCHLOSSER & AYER
1000 Second Avenue, Suite 1500
Seattle, Washington 98104-1046
(206) 386-5200
Attorneys for Petitioners Red Lake Band of Chippewa Indians, et al.

Of Counsel:

JAMES F. BODIN
Edwards, Edwards & Bodin
312 Alworth Building
Duluth, Minnesota 55802.
(218) 727-7431

APPENDIX
TABLE OF CONTENTS

Page

United States Court of Appeals, for the Eighth Circuit, No. 86-5453, Order Denying Petition for Rehearing (September 28, 1987) ..... App. 1

United States Court of Appeals for the Eighth Circuit, No. 86-5453 Opinion of August 31, 1987 .....App. 2

United States District Court for the District of Minnesota, Memorandum and Order of October 24, 1986..... App. 10

Federal Records Act ..... App. 24

Bureau of Indian Affairs Regulations ..... App. 26

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No. 86-5453MN

United States of America Appellee,	*	
vs.	*	Appeal from the United States District Court for
Red Lake Band of Chippewa Indians, et al., Appellants.	*	the District of Minnesota

Appellants' petition for rehearing has been considered by the Court and is denied.

September 28, 1987

Order entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit.

BEST AVAILAB

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-5453

United States of America, Appellee,	*	
v.	*	Appeal from the United States District Court for the District of Minnesota
Red Lake Band of Chippewa Indians, Red Lake Tribal Council; Roger Jourdain; Royce Graves; James Strong; Allen English; Lawrence Bedeau; George Jones; Adolph Barrett; Roman Stately, Jr.; Gerald Brun; Dan Raincloud,Jr; Tom Stillday, Appellants.	*	

Submitted: June 11, 1987
Filed: August 31, 1987

Before McMILLAN, Circuit Judge, FAIRCHILD,* Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

McMILLAN, Circuit Judge.

---

* The Honorable Thomas E. Fairchild, Senior Circuit Judge for the United States Court of Appeals for the Seventh Circuit, sitting by designation.

LE COPY

The Red Lake Band of Chippewa Indians, the Red Lake Tribal Council and Red Lake Band officials (collectively Red Lake) appeal from a final judgment entered in the District Court[1] for the District of Minnesota granting custody to the United States of certain records of the Red Lake Court of Indian Offenses (the tribal court). For reversal, Red Lake contends (1) tribal sovereign immunity bars the district court's assertion of jurisdiction over this action, and (2) the district court erred in granting summary judgment because there existed a genuine issue of material fact about whether the tribal court records were agency records belonging to the United States. For the reasons discussed below, we affirm the judgment of the district court.

In August 1985, Red Lake removed case records from its tribal court and stored them in the tribal archives. The Bureau of Indian Affairs (BIA) demanded that Red Lake return the records and Red Lake refused. The United States then filed this action under the Federal Records Act, 44 U.S.C. § 3106,[2] seeking recovery of the

---

1 The Honorable Harry H. MacLaughlin, United States District Judge for the District of Minnesota.

2 44 U.S.C. § 3106 provides:

> *Unlawful removal, destruction of records.* The head of each Federal agency shall notify the [Federal Records] Archivist of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency of which he [or she] is the head that shall come to his [or her] attention, and with the assistance of the Archivist shall initiate action through the Attorney General for the recovery of records he [or she] knows or has reason to believe have been unlawfully removed from his [or her] agency, or from another Federal Agency whose records have been transferred to his [or her] legal custody. In any case in which the head of the agency does not initiate an action for such recovery or other redress within a reasonable period of time after being notified of any such unlawful action, the Archivist

The district court granted summary judgment for the United States. *United States v. Red Lake Band of Chippewa Indians*, Civ. No. 6-86-34 (D. Minn. Oct. 31, 1986) (memorandum opinion). The district court held first that it had jurisdiction over the case because sovereign immunity may not be asserted by an Indian tribe against the United States. *Id.* at 5. The district court relied on *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 153-54 (1980) (*Colville*), where the Supreme Court held that "tribal sovereignty is dependent on, and subordinate to, . . . the Federal Government," and that "tribes retain . . . their historical sovereignty not inconsistent with the overriding interests of the National Government."

Red Lake acknowledges on appeal that tribal sovereign immunity is not absolute as against the federal government. Red Lake contends, however, that the Supreme Court has held that only Congress may override tribal sovereign immunity and only by express waiver, citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (*Santa Clara Pueblo*). There, the Court stated: "[T]ribal sovereign immunity . . . is subject to the superior and plenary control of Congress. But without congressional authorization, the Indian Nations are exempt from suit. It is well settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Id.* at 58 (citations omitted). Red Lake argues that the district court's jurisdictional ruling in this case contradicts *Santa Clara Pueblo* and means that any federal agency may waive tribal sovereign immunity merely by suing the tribe, whether or not Congress has waived the tribe's sovereign immunity. Congress has not

---

(n. 2 cont.)

shall request the Attorney General to initiate such an action, and shall notify the Congress when such a request has been made.

expressly waived tribal sovereign immunity under the Federal Records Act.

Whether tribal sovereign immunity may bar an action by the United States against an Indian tribe is a question of first impression in this circuit. In *United States v. White Mountain Apache Tribe*, 784 F.2d 917, 920 (9th Cir. 1986), the Ninth Circuit held that "the Tribe's own sovereignty does not extend to preventing the federal government from exercising its superior sovereign powers." This principle was later cited by the same court in *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986) (*Yakima*), *cert. denied*, 107 S. Ct. 2461 (1987), in support of its holding that the United States could sue and override a tribe's sovereign immunity just as it could sue and ovedrride a state's sovereign immunity, *citing United States v. Mississippi*, 380 U.S. 128, 140-41 (1965) (*Mississippi*) (federal sovereignty overrides state sovereignty).

Red Lake seeks to distinguish the *Yakima* and *White Mountain* cases. In both cases, the tribe obtained an injunction in tribal court preventing federal officials from carrying out official duties on the reservation. The United States challenged the injunctions in federal district court and the tribe resisted, arguing the district court had no jurisdiction. Because the tribes initiated the proceedings in tribal court, Red Lake argues that the tribes had waived their sovereign immunity with respect to the orders and decisions of the tribal court, which orders and decisions were in turn the subject of the litigation in federal district court. Red Lake also argues that the analogy drawn in *Yakima* between the relationship of the federal government and Indian tribes and that between the federal government and the individual states is not apt because Indian tribes exist in a trust relationship with the federal government and the states do not.

See F. Cohen, Handbook of Federal Indian law 220-21 (1982 ed.). Red Lake asserts it would not be a proper exercise of the federal government's fiduciary duty to permit an implicit waiver of tribal sovereign immunity whenever a federal agency wanted to sue an Indian tribe.

We conclude it is an inherent implication of the superior power exercised by the United States over the Indian tribes that a tribe may not interpose its sovereign immunity against the United States. In general, Indian tribes possess the common-law immunity from suit traditionally enjoyed by sovereign powers. *Turner v. United States*, 248 U.S. 354, 358 (1919). The status of Indian tribes in relation to the United States, however, is paradoxical. "[T]he relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15 (1831). The tribes have been described as "domestic dependent nations," *id.* at 17, exercising many of the sovereign powers of an independent nation, yet existing in a ward-guardian relationship with the federal government and thus subject to its superior and plenary powers. In sum, the Indian tribes are distinct, independent political communities, retaining the right of self-government, yet subject to the protecting power of the United States. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

This status has been interpreted to mean that Indian tribes retain all fundamental attributes of sovereignty unless divested of them by federal law or by the "necessary implication of their dependent status." *Colville*, 447 U.S. at 152 (citation omitted).[3] Tribal immunity from suit

---

3 The Supreme Court has found such a divestiture in cases where: "the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to

without their consent is among those fundamental attributes of sovereignty that may be divested as an implicit result of their dependent status. *Cf. United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940) ("[I]t is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did."). We conclude that just as a state may not assert sovereign immunity as against the federal government, *Mississippi*, 380 U.S. at 140-41, neither may an Indian tribe, as a dependent nation, do so. Tribal sovereign immunity may not be asserted against the United States and we hold therefore that the district court had jurisdiction over this case.

Red Lake next contends the district court erred in ruling that the tribal court records are agency records and thus the property of the United States. The question of ownership of the tribal court records depends on the status of the Red Lake Court of Indian Offenses. The United States argues that the tribal court is a "C.F.R. court" organized under the BIA and governed by 25 C.F.R. Pt. 11. Part 11 establishes "Courts of Indian Offenses" on designated reservations for the purpose of providing "adequate machinery of law enforcement for those Indian tribes in which traditional agencies for the enforcement of tribal law and custom have broken down for which no adequate substitute has been provided under Federal or State law." 25 C.F.R. § 11.1(b). The Red Lake Reservation is among those reservations specifically designated in the regulation. *Id.* § 11.1(a)(6). The records of C.F.R. courts are agency records and

---

(n. 3 cont.)

non-Indians without federal consent or prosecute non-Indians in tribal courts which do not accord the full protection of the Bill of Rights." *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 153-54 (citations omitted).

(federal records are "all books, papers . . . or other documentary materials . . . made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved as appropriate for preservation by that agency"); 25 C.F.R. § 11.11 (C.F.R. courts must keep records of all court proceedings and these records are to be kept at a BIA office).

Red Lake contends that because its tribal court is an independent tribal court and therefore not subject to the recordkeeping provisions of 25 C.F.R. § 11.1, its tribal court records are not agency records belonging to the United States. Designated tribal courts are presumptively C.F.R. courts. A C.F.R. court may, however, exempt itself from BIA regulation and be reclassified as an independent tribal court if the tribe establishes that it was organized under the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. §§ 461-479, and that it has adopted its own law and order code in accordance with its constitution and bylaws. 25 C.F.R. § 11.1(d).

The district court entered summary judgment in this case because Red Lake failed to offer any evidence that the tribe had met the requirements of § 11.1(d). Memorandum opinion at 10, 13. Red Lake contends on appeal that the district court should not have ordered summary judgment, but should instead have permitted further discovery on these issues.

Red Lake did not offer evidence establishing the necessary elements for exemption under § 11.1(d) at the summary judgment stage. Red Lake merely stated then, as it does now, that it does not know whether the tribe is organized under the IRA or whether the tribe has adopted a law and order code that effectively supplants agency regulation. Red Lake thus failed to produce any evidence that would lead the district court to conclude

that there existed any genuine factual dispute about whether the tribal court was still a C.F.R. court, as the Red Lake tribal court is specifically designated in the Part 11 regulations. The structure of the regulations requires Red Lake to affirmatively establish that it has met the exemption requirements of § 11.1(d). Absent evidence that the exemption applies, the Part 11 regulations would indicate that the United States was entitled to judgment as a matter of law. Red Lake's unsupported assertions that additional discovery is necessary on these issues are not sufficient to create a factual issue that would make summary judgment inappropriate in this case. *See* Fed. R. Civ. P. 56(e) (party resisting motion for summary judgment may not rest on mere allegations or denials, but must set forth in his or her response specific facts showing that there is a genuine issue for trial). We hold the district court did not err in entering summary judgment in this case.

Accordingly, the judgment of the district court is affirmed.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

United States of America, Plaintiff,	*	
v.	*	CIVIL 6-86-34
Red Lake Band of Chippewa Indians, Red Lake Tribal Council; Roger Jourdain, Chairman; Royce Graves, Secretary; James Strong, Treasurer; Allen English, Lawrence Bedeau, George Jones, Adolph Barrett, Roman Stately, Jr., Gerald Brun, Dan Raincloud, Jr. and Tom Stillday, District Representatives, Defendants.	*	MEMORANDUM AND ORDER October 24, 1986

McLaughlin, J.

This matter is before the Court on plaintiff's motion for summary judgment and defendants' motion to dismiss. Plaintiff's motion will be granted and defendants' motion will be denied.

Facts

This is an action by the United States against the Red Lake Band of Chippewa Indians and the Red Lake Tribunal [sic] Council of Minnesota. Jurisdiction lies under 28 U.S.C. § 1345. The United States seeks to

recover documents from the Red Lake Court of Indian Offenses, which were removed from the court pursuant to an August 29, 1985 Tribunal [sic] Council Ordinance which states:

> All Red Lake Court of Indian Offenses cases records shall be kept confidential by the Court and information contained in the case records shall be withheld from public disclosure.

Red Lake Tribal Council Ordinance No. 1-85. The tribal council, through Resolution No. 234-85 (passed the same date as the ordinance), ordered the case records of all closed cases of the Red Lake Court to be transferred to the tribal archives. The resolution further provides that these records shall be kept confidential and not made available for public inspection. The transfer to the tribal archives occurred on August 30, 1985. On September 17, 1985 the Bureau of Indian Affairs (BIA) made a formal demand upon the defendant for the return of the records. Defendant has refused to return the records. The BIA and the Department of the Interior claim that these court records are agency records belonging to the federal government, and that defendants' removal and continued possession of these records is in violation of the Federal Records Act, 44 U.S.C. § 3106. Defendants contend that the records are the property of the tribe, because the Red Lake Court is an independent tribal court and not subject to BIA regulations. Defendants further contend that the Court is without jurisdiction to hear this case because of Indian sovereign immunity from suit.

Jurisdiction

Defendant Red Lake Band of Chippewa Indians disputes the Court's jurisdiction over this action. Defendant asserts that Indian sovereign immunity prevents the

United States government from suing an Indian tribe without express congressional authorization.

Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. *Santa Clara Pueblo v. Martinez*, 436 U.S. 47, 60 (1978); *Puyallup Tribe, Inc. v. Washington Department of Game*, 433 U.S. 165, 172-73 (1977); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 612-13 (1940); *Turner v. United States*, 248 U.S. 354, 358 (1919). This tribal sovereign immunity is subject to the superior and plenary control of Congress, and Congress may, through an unequivocal expression of legislative intent, waive the sovereign immunity of an Indian tribe. *Santa Clara Pueblo*, 436 U.S. at 60; *United States Fidelity & Guaranty Co.*, 309 U.S. at 512. *See also United States v. Testar*, 424 U.S. 392, 399 (1976) *quoting United States v. King*, 395 U.S. 1, 4 (1969) (discussing standards for a waiver of sovereign immunity). Tribal sovereign immunity does not, however, bar actions by the United States against Indian tribes. As the Supreme Court has stated, "[t]ribal sovereignty is dependent on, and subordinate to, only the *Federal Government*," *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 154 (1980), and "tribes retain . . . their historical sovereignty not 'inconsistent with the overriding interests of the National Government.'" *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983) *quoting Confederate Tribes*, 447 U.S. at 153. (Both of these cases involve suits by states, not the federal government.) While there is no Eighth Circuit law on point, two recent Ninth Circuit cases have addressed the issue of Indian tribal sovereign immunity and suits by the federal government. In *United States v. White Mountain Apache Tribe*, 784 F.2d 917 (9th Cir. 1986), an Indian tribal court had attempted to enjoin federal officials from conducting official business on the reservation, specifically from prepar-

ing and filing a water rights claim in state court on behalf of the tribe. The United States sued in federal court seeking declaratory relief. The tribe argued that the suit in federal court was barred by the tribe's sovereign immunity, but this argument was rejected by the court. The court held that a "[t]ribe's own sovereignty does not extend to preventing the federal government from exercising its superior sovereign powers." *White Mountain Apache Tribe*, 784 F.2d at 920. In *United States v. Yakima Tribal Court of the Yakima Indian Nation*, 794 F.2d 1402 (9th Cir. 1986), a tribal court order attempted to prevent federal officials from relocating an irrigation canal on Indian land. The United States sued, and the Ninth Circuit held that Indian sovereign immunity did not extend to preventing the federal government from exercising its superior sovereign power to seek a declaration in federal district court that the tribal court order was void. The *Yakima* court held that the United States could sue and override an Indian tribe's immunity just as it could sue and override a state's sovereign immunity. *Yakima Tribal Court*, 794 F.2d at 1408, discussing *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965) (state sovereign immunity overridden by United States suit).

The reasoning of the *White Mountain Apache Tribe* and *Yakima Tribal Court* cases is persuasive and consistent with Supreme Court pronouncements in *Confederated Tribes* and *San Carlos Apache Tribe*. The Court's assertion of jurisdiction over this case does not repudiate the right of Indian tribes to sovereign immunity, but simply recognizes that such sovereign immunity does not work as against the United States. Therefore, defendant's motion to dismiss this action for lack of jurisdiction will be denied.

Summary Judgment

A defendant is not entitled to summary judgment unless the defendant can show that no genuine issue exists as to any material fact. Fed.R.Civ.P. 56(c). Summary judgment is an extreme remedy that should not be granted unless the moving party has established a right to judgment with such clarity as to leave no room for doubt and unless the non-moving party is not entitled to recover under any discernible circumstances. *E.g., Vette Co. v. Aetna Casualty & Surety Co.*, 612 F.2d 1076, 1077 (8th Cir. 1980). In considering a summary judgment motion, a court must view the facts most favorably to the non-moving party and give that party a benefit of all reasonable inferences that can be drawn from the facts. *E.g., Hartford Accident & Indemnity Co. v. Stauffer Chemical Co.*, 741 F.2d 1142, 1144-45 (8th Cir. 1984). The non-moving party may not merely rest upon the allegations or denials of the party's pleading, but must set forth specific facts, by affidavits or otherwise, showing that there is a genuine issue for trial. *Salinas v. School District of Kansas City*, 751 F.2d 288, 289 (8th Cir. 1984).

Possession of the Red Lake Court Records

On August 29, 1985 the Red Lake Tribal Council passed Ordinance No. 1-85 which states:

> All Red Lake Court of Indian Offenses case records shall be kept confidential by the Court and information contained in the case records shall be withheld from public disclosure.

Also on that day the tribal council passed Resolution No. 234-85, ordering the Red Lake court to transfer the case records of all closed cases of the court to the tribal archives and providing that the records shall be kept confidential and not made available for public inspection.

On August 30, 1985, all closed case records of the Red Lake Court of Indian Offenses were transferred to the tribal archives. On September 17, 1985, the BIA made a formal demand upon the defendants for the return of the agency records. Defendants have not returned the documents but admit that they are in possession of the records at issue. Defendants claim the records belong to the tribe; plaintiff claims the records belong to the federal government.

The primary issue in dispute in this case is the status of the Red Lake Court of Indian Offenses. Plaintiff argues that the Red Lake court is organized pursuant to Title 25 of the Code of Federal Regulations, Part 11, that it is a creation of the BIA and the Department of the Interior, and that therefore its records are agency records belonging to the federal government. Defendants argue that the Red Lake Court is an independent tribal court pursuant to Title 25 C.F.R. § 11.1(d) and that its records belong to the tribe.

The Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, is authorized to manage all Indian affairs and all matters arising out of Indian relations. 25 U.S.C. § 2. Pursuant to this authority, the commissioner has promulgated regulations establishing and governing courts of Indian offenses. 25 C.F.R. Part 11. 25 C.F.R. Part 11 states:

> It is the purpose of the regulations in this part to provide adequate machinery of law enforcement for those Indian tribes in which traditional agencies for the enforcement of tribal law and custom have broken down for which no adequate substitution has been provided under Federal or State law.

25 C.F.R. § 11.1(b). The regulations list the Indian reservations subject to Part 11, and this list includes the Red Lake, Minnesota reservation. 25 C.F.R. § 11.1.(a)(6). The regulations in 25 C.F.R. Part 11 govern the practice and procedure of courts of Indian offenses. For example, judges of the courts are appointed and removed by the BIA. 25 C.F.R. §§ 11.3(b), 11.4. The offenses adjudicated in the courts of Indian offenses are codified at 25 C.F.R. §§ 11.30 *et seq.*, and this Code of Indian Tribal Offenses controls on the Indian reservations. Indian tribal councils may adopt ordinances applicable to their own tribes, and after an ordinance has been approved by the Secretary of the Interior it becomes controlling; any inconsistent regulations in Part 11 will no longer be applicable to that tribe. 25 C.F.R. § 11.1(e). In addition, 25 C.F.R. § 11.11 states:

> Each Court of Indian Offenses shall be required to keep, for inspection by duly qualified officials, a record of all proceedings of the court, which record shall reflect the title of the case, the names of the parties, the substance of the complaint, the names and addresses of all witnesses, the date of the hearing or trial, by whom conducted, the findings of the court or jury, and the judgment, together with any other facts or circumstances deemed of importance to the case. A record of all proceedings shall be kept at the agency [BIA] office, as required by 25 U.S.C. 200.[1]

---

1 25 U.S.C. § 200 provides that whenever an Indian is incarcerated in an agency jail or other place of confinement on an Indian reservation, a report or record of the offense or case must be made a part of the records of the agency [BIA] office.

Records kept pursuant to 25 C.F.R. § 11.11 are kept at the BIA agency office. The BIA is part of the Department of the Interior, and is therefore a federal agency. Records of a federal agency are subject to the Federal Records Act, 44 U.S.C. § 101, *et seq.* Federal records are "all books, papers . . . or other documentary materials . . . made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency . . . ." 44 U.S.C. § 3301. Thus the records of courts of Indian offenses, kept pursuant to 25 C.F.R. § 11.11, are the property of the federal government, and unauthorized possession or removal of these records is unlawful. *See* 44 U.S.C. § 3106 (authorizing the Attorney General to sue on behalf of the agency administrator to recover unlawfully removed records). Moreover, the Department of the Interior and the BIA have promulgated internal agency rules for the disposition of the records of courts of Indian offenses. Under the agency rules of the Department of the Interior, "[a]ll official records, regardless of their form, belong to the Department rather than to the officer who has custody of them and are to remain in the custody of the Department until there is official authorization for disposal." 384 Department of the Interior Departmental Manual 3.4A 2/2085 # 2625. The BIA rules state that records of the courts of Indian offenses are to remain in the BIA's custody for twenty years, and are then to be transferred to the National Archives. *See* Bureau of Indian Affairs Manual, Record Disposal Schedule 172, Supp. 3, Release 1, 2/11/77.

Title 25 C.F.R. § 11.11(d) limits the application of Part 11 regulations with regard to certain non-C.F.R. governed, independent tribal courts. Section 11.1(d) states:

> The regulations in this part shall continue to apply to tribes organized under the act of June 18, 1934 . . . until a law and order code has been adopted by the tribe in accordance with its constitution and by-laws and has become effective; and thereafter §§ 11.3, 11.4, 11.301, 11.302, 11.303, 11.304, 11.305 and 11.306 shall continue in effect as long as the Indian judges and Indian police are paid from appropriations made by the United States or until otherwise directed.

Thus the tribal courts of tribes coming under the provisions of section 11.1(d) are not subject to the record-keeping provisions of 25 C.F.R. § 11.11, and the records of such independent tribal courts are not federal agency records. Defendants contend that the Red Lake Tribe and the Red Lake Court of Indian Offenses comes under the provisions of 11.11(d). Defendants must establish two factors before the Red Lake Court of Indian Offenses can be classified as an independent tribal court under section 11.1(d). First, the tribe must be organized under the Indian Reorganization Act. Second, the tribe must have adopted its own law and order code in accordance with its constitution and bylaws.

A. The Indian Reorganization Act

The Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479, states in relevant part:

> Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate consituation [sic] and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reserva-

> tion, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

25 U.S.C. § 476. Defendants have failed to offer any evidence to establish that the tribe is organized in this manner. Moreover, plaintiff has submitted documents from the defendants which clearly indicate that the defendants themselves believe the Red Lake court is a court of Indian offenses under the C.F.R. and the BIA and therefore not a tribal court of a tribe organized under the Act. For example, when the BIA began listing the specific Indian reservations to which 25 C.F.R. § 11.1 *et seq.* applied in section 11.1(a), the Red Lake reservation was not on the list. Consequently the Red Lake Tribal Council passed Resolutions No. 70-81, specifically directing their tribal attorneys "to investigate the misunderstanding existing within the [BIA] as to the status of the Red Lake Court of Indian Offenses and to take such steps as are deemed necessary to correct the . . . arbitrary reclassification of the Red Lake Court of Indian Offenses." Plaintiff's Memorandum Exh. A. The resolution further states that "the Red Lake Court of Indian Offenses was first established by the [BIA] in 1884 and has operated as such since then under provisions of the Code of Federal Regulations." *Id.* Pursuant to this resolution, defendant's counsel sent a letter to then-Secretary of the Interior James Watt, dated August 10,

1981. The letter states that the Red Lake Court was "originally and ever since has operated under the provisions of Title 25 Code of Federal regulations or *in other words as a Bureau of Indian Affairs Court.*" Plaintiff's Memorandum Exh. F (emphasis added). The August 10, 1981 letter also states that "the Red Lake Reservation Court of Indian Offenses . . . certainly comes under the application of . . . [section] 11.1(b)." *Id.* Section 11.1(b) is the purpose section for the establishment and maintenance of C.F.R. courts of Indian Offenses; it states that Part 11 regulations only apply where there is no "traditional agenc[y] for the enforcement of tribal law," such as an independent tribal court. In response to defendant's request that it be officially included on the list of reservations governed by Part 11, the BIA published an amendment to the Part 11 regulations including the Red Lake Reservation on the list. 47 Fed. Reg. 22093 (May 21, 1982).

Another letter from the Red Lake's tribal attorney to the tribal chairman, dated April 12, 1985, states that:

> The Red Lake Court of Indian Offenses is a Federal Government Court system set up pursuant to title 25 of the Code of Federal Regulations. The Red Lake Court system *is under the control, direction and supervision of the United States Department of Interior* and administered by the Bureau of Indian Affairs. The staff of the Red Lake Court of Indian Offenses are employees of the United States Department of Interior, Bureau of Indian Affairs. The Red Lake Court of Indian Offenses *is not a tribally operated court system.*

Plaintiff's Memorandum Exh. G (emphasis added). And in a memorandum from the Red Lake tribal chairman to the Red Lake council members, dated April 13,

1985, the chairman states that, "[t]he Court personnel are Federal employees and the Red Lake Court System is a Federal Government Court System under the control of the United States Department of Interior." Plaintiff's Memorandum Exh. H. These documents show that the defendants believe that the Red Lake court is a C.F.R. court of Indian offenses subject to the regulations in Part 11. If defendants believed that the tribe was organized under the Indian Reorganization Act, they would not have classified the Red Lake Court of Indian Offenses as a "Bureau of Indian Affairs Court," but as an independent tribal court.

B. The Tribe's Law and Order Code

The second factor that defendants must establish to be classified as an independent tribal court under section 11.1(d) is that the tribe adopted its own law and order code in accordance with its constitution and bylaws. Defendants have failed to establish this factor. Defendants assert that the tribe has adopted a law and order code, and plaintiff does not dispute this. However, this is not sufficient by itself to establish that defendants are subject to section 11.1(d). Defendants may have adopted ordinances that replaced the law and order code of the C.F.R. and still be subject to the remaining parts of the C.F.R. governing the administration of courts of Indian offenses. This is possible given the provisions of 25 C.F.R. § 11.1(e), which states:

> Nothing in this section shall prevent the adoption by the tribal council of ordinances applicable to the individual tribe, and after such ordinances have been approved by the Secretary of the Interior they shall be controlling, and the regulations of this part which may be inconsis-

tent therewith shall no longer be applicable to that tribe.

Thus the tribal court could be adjudicating offenses wholly different from the C.F.R. law and order code and still be a court of tribal offenses governed by the C.F.R. Defendants have not offered any evidence to establish that the tribe's law and order code was in fact adopted pursuant to section 11.1(d) and not section 11.1(e). In fact, in the August 10, 1981 letter from defendants' counsel to then-Secretary of the Interior James Watt, counsel states that the adoption of the law and order code by the tribal counsel and its approval by the Secretary of the Interior on February 15, 1952 "was performed under what is now Section 11.1e, 25 C.F.R. (1980)." Plaintiff's Memorandum Exh. F. If defendants believed section 11.1(d) applied to the tribe, they would not have stated that the tribe's law and order code was enacted under section 11.1(e).

Defendants have not offered any evidence to support their contention that the Red Lake court is a tribal court pursuant to section 11.1(d). Moreover, plaintiff has produced substantial evidence of defendants' assertions that the Red Lake court is in fact a C.F.R.-created court, subject to all of the Part 11 regulations. Since it is undisputed that the records of a C.F.R. court of Indian offenses are records of a federal agency, specifically, the BIA/Department of the Interior, defendants' removal and continued possession of the Red Lake court records is unlawful. *See* 44 U.S.C. § 3106. Therefore, plaintiff's motion for summary judgment will be granted.

Based on the foregoing, and upon all the files, records, and proceedings in this matter,

IT IS ORDERED that defendant's motion to dismiss for lack of jurisdiction is denied.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment is granted.

FEDERAL RECORDS ACT

44 U.S.C. § 3106

Unlawful removal, destruction of records.

The head of each Federal agency shall notify the [Federal Records] Archivist of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency of which he [or she] is the head that shall come to his [or her] attention, and with the assistance of the Archivist shall initiate action through the Attorney General for the recovery of records he [or she] knows or has reason to believe have been unlawfully removed from his [or her] agency, or from another Federal Agency whose records have been transferred to his [or her] legal custody. In any case in which the head of the agency does not initiate an action for such recovery or other redress within a reasonable period of time after being notified of any such unlawful action, the Archivist shall request the Attorney General to initiate such an action, and shall notify the Congress when such a request has been made.

FEDERAL RECORDS ACT

33 U.S.C. § 3301

Definition of Records.

As used in this chapter, "records" includes all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by any agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience or reference, and stocks of publications and of processed documents are not included.

BUREAU OF INDIAN AFFAIRS REGULATIONS

25 C.F.R. Part 11

Law and Order on Indian Reservations

SUBCHAPTER B—LAW AND ORDER

PART 11—LAW AND ORDER ON INDIAN RESERVATIONS

Application; Jurisdiction

Sec.
11.1 Application of regulations.
11.2 Jurisdiction.

Courts Of Indian Offenses

11.3 Judges.
11.4 Removal of judges.
11.5 Court procedure.
11.6 Appellate proceedings.
11.6C Appellate proceedings.
11.7 Juries.
11.7C Juries.
11.8 Witnesses.
11.10 Clerks.
11.11 Records.
11.12 Copies of laws.
11.13 Complaints.
11.14 Warrants to apprehend.
11.15 Arrests.
11.16 Search warrants.
11.17 Commitments.
11.18 Bail or bond.
11.19 Definition of signature.
11.20 Definition of tribal council.
11.20C Definition of tribal council.
11.21 Cooperation by Federal employees.

Civil Actions

11.22 Jurisdiction.
11.22C Jurisdiction.
11.23 Law applicable to civil actions.
11.24 Judgments in civil actions.
11.24C Judgments in civil actions.
11.25 Costs in civil actions.
11.26 Payment of judgments from individual Indian moneys.
11.26C Payment of judgments from individual Indian moneys.

Domestic Relations

11.27 Recording of marriages and divorces.
11.28 Tribal custom marriage and divorce.
11.29 Tribal custom adoption.
11.29C Adoption.
11.30 Determination of paternity and support.
11.31 Determination of heirs.
11.31C Determination of heirs.
11.32 Approval of wills.
11.32C Approval of wills.

Sentences

11.33 Nature of sentences.
11.34 Probation.
11.34C Probation.
11.35 Parole.
11.36 Juvenile delinquency.
11.36C Juvenile delinquency.
11.37 Disposition of fines.

Code Of Indian Tribal Offenses

11.38 Assault.
11.39 Assault and battery.
11.40 Carrying concealed weapons.
11.41 Abduction.
11.42 Theft.
11.43 Embezzlement.
11.44 Fraud.
11.45 Forgery.
11.46 Misbranding.
11.47 Receiving stolen property.
11.48 Extortion.
11.49 Disorderly conduct.
11.50 Reckless driving.
11.50C Reckless driving.
11.50ME Traffic violations.
11.51 Malicious mischief.
11.52 Trespass.
11.53 Injury to public property.
11.54 Maintaining a public nuisance.
11.55 Liquor violations.
11.55ME Liquor violations.
11.56 Cruelty to animals.
11.57 Game violations.
11.58 Gambling.
11.59 Adultery.
11.60C Fornication.
11.61 Illicit cohabitation.
11.62 Prostitution.
11.63 Giving venereal disease to another.
11.63C Giving venereal disease to another.
11.64 Failure to support dependent persons.
11.64C Failure to support dependent persons.
11.65 Failure to send children to school.
11.66 Contributing to the delinquency of a minor.
11.67 Bribery.
11.68 Perjury.
11.69 False arrest.
11.70 Resisting lawful arrest.
11.70ME Resisting or obstructing officers.
11.71 Refusing to aid officer.
11.72 Escape.
11.73 Disobedience to lawful orders of court.
11.74 Violation of an approved tribal ordinance.
11.75C Limitation on filing of complaints.
11.76H Failure to sell or remove from tribal range infectious or cull animals.
11.77H Introduction of livestock without permit.
11.78H Stock trespass in form of unauthorized use of range.
11.79H Failure to dip sheep.

Sec.
11.80H Making false reports of stock owned.
11.81H Unauthorized fencing of tribal land.
11.82H Inter-district trespass.
11.83H Grazing stock without permit.
11.84H Refusing to brand or mark livestock.
11.85H Obstructing or interfering with livestock roundups.
11.86H Trespass on areas reserved for demonstration purposes.
11.87H Peyote violations.
11.88ME Curfew.
11.89ME Firearms.
11.90ME Keeping of livestock.
11.91ME Control of dogs.
11.92ME Forest fire protection.
11.93ME Possession of controlled substances.
11.94ME Garbage and rubbish.
11.95ME Extradition.
11.96ME Breaking and entering.
11.97ME Juvenile services.
11.98ME Date of incorporated statutes.

THE INDIAN POLICE

11.301 Superintendent in command.
11.302 Police commissioners.
11.303 Police training.
11.304 Minimum standards for police programs.
11.305 Minimum standards for detention programs.
11.306 Return of equipment.

AUTHORITY: R.S. 463; 25 U.S.C. 2. Interpret or apply sec. 1, 38 Stat. 586; 25 U.S.C. 200, unless otherwise noted.

SOURCE: 22 FR 10515, Dec. 24, 1957, unless otherwise noted.

NOTE: The regulations in this part are applicable on Indian reservations subject to the provisions of § 11.1, and the following exceptions:

Sections 11.6, 11.7, 11.20, 11.22, 11.24, 11.26, 11.28, 11.29, 11.31, 11.32, 11.34, 11.36, 11.50, 11.63, and 11.64, not applicable to Crow Indians.

Sections 11.6C, 11.7C, 11.20C, 11.22C, 11.24C, 11.26C, 11.29C, 11.31C, 11.32C, 11.34C, 11.36C, 11.50C, 11.60C, 11.63C, 11.64C, and 11.75C, applicable only to Crow Indians.

Sections 11.76H to 11.87H, inclusive, applicable only to Hopi Indians.

Sections 11.1, 11.2, 11.3, 11.5, 11.6, 11.6C, 11.7, 11.7C, 11.8, 11.20C, 11.22, 11.22C, 11.24, 11.24C, 11.25, 11.26C, 11.28, 11.29, 11.29C, 11.30, 11.31, 11.31C, 11.32, 11.32C, 11.33, 11.34C, 11.36C, 11.37, 11.49, 11.50C, 11.52, 11.53, 11.57, 11.58, 11.60C, 11.63, 11.63C, 11.64C, 11.74, 11.75C, and 11.76H-11.87H, inclusive, are not applicable to Coeur d'Alene Indians.

All sections in Part 11 not heretofore mentioned in this note are applicable to the Coeur d'Alene Indians.

EDITORIAL NOTE: Nomenclature changes appear at 38 FR 10927, May 3, 1973.

APPLICATION; JURISDICTION

§ 11.1 Application of regulations.

(a) Except as otherwise provided in this part, §§ 11.1 through 11.87 of this part apply to the following Indian reservations:

(1) Omaha (Nebraska).
(2) Flandreau (South Dakota).
(3) Yankton (South Dakota).
(4) Wind River (Wyoming).
(5) Bois Forte (Minnesota).
(6) Red Lake (Minnesota).
(7) Cocopah (Arizona).
(8) Kaibab (Arizona).
(9) Hopi (Arizona) (Tribal court enforcement of special grazing regulations).
(10) Fallon (Nevada).
(11) Goshute (Nevada).
(12) Lovelock (Nevada).
(13) Te-Moak (Nevada).
(14) Yomba (Nevada).
(15) Duckwater Shoshone (Nevada).
(16) Kootenai (Idaho).
(17) Shoalwater Bay (Washington).
(18) Hoopa (California) (Jurisdiction limited to special fishing regulations).
(19) Anadarko Area Tribes (Western Oklahoma).
(20) Choctaw (Mississippi).
(21) Eastern Cherokee (North Carolina).
(22) Louisiana Area (Louisiana) (Includes Coushatta and other tribes in the State of Louisiana which occupy Indian country and which accept the application of this part; *provided* that this part shall not apply to any Louisiana tribe other than the Coushatta Tribe until notice of such application has been published in the FEDERAL REGISTER.)

(b) It is the purpose of the regulations in this part to provide adequate machinery of law enforcement for those Indian tribes in which traditional agencies for the enforcement of tribal law and custom have broken down for which no adequate substitute has been provided under Federal or State law.

(c) No court of Indian Offenses will be established on reservations where justice is effectively administered under State laws and by State law enforcement agencies.

(d) The regulations in this part shall continue to apply to tribes organized under the act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461-479), until a law and order code has been adopted by the tribe in accordance with its constitution and by-laws and has become effective; and thereafter §§ 11.3, 11.4, 11.301, 11.302, 11.303, 11.304, 11.305 and 11.306 shall continue in effect as long as the Indian judges and Indian police are paid from appropriations made by the United States or until otherwise directed.

(e) Nothing in this section shall prevent the adoption by the tribal council of ordinances applicable to the individual tribe, and after such ordinances have been approved by the Secretary of the Interior they shall be controlling, and the regulations of this part which may be inconsistent therewith shall no longer be applicable to that tribe.

(5 U.S.C. 301 and 25 U.S.C. 2)

[22 FR 10515, Dec. 24, 1957, as amended at 49 FR 7366, Feb. 29, 1984; 49 FR 12244, Mar. 29, 1984; 50 FR 12242, Mar. 28, 1985]

§ 11.2 Jurisdiction.

(a) A Court of Indian Offenses shall have jurisdiction over all offenses enumerated in §§ 11.38 through 11.87H, when committed by any Indian, within the reservation or reservations for which the court is established, provided that such court on the Hopi Reservation shall also have jurisdiction to enforce against members of the tribe within the Hopi Reservation the ordinances passed by the Hopi tribal council which prohibit offenses against the peace and welfare of the tribe committed by such members off the reservation.

(b) With respect to any of the offenses enumerated in §§ 11.38 through 11.87H, over which Federal or State courts may have lawful jurisdiction, the jurisdiction of the Court of Indian Offenses shall be concurrent and not exclusive. It shall be the duty of the said Court of Indian Offenses to order delivery to the proper authorities of the State or Federal Government or of any other tribe or reservation, for prosecution, any offender, there to be dealt with according to law or regulations authorized by law, where such authorities consent to exercise jurisdiction lawfully vested in them over the said offender.

(c) For the purpose of the enforcement of the regulations in this part, an Indian shall be deemed to be any person of Indian descent who is a member of any recognized Indian tribe now under Federal jurisdiction and a "reservation" shall be taken to include all territory within reservation boundaries, including fee patented lands, roads, waters, bridges, and lands used for agency purposes.

(d) All Indians employed in the Indian Service shall be subject to the jurisdiction of the Court of Indian Offenses but any such employee appointed by the Secretary of the Interior shall not be subject to any sentence of such court, unless such sentence shall have been approved by the Secretary of the Interior.

Courts of Indian Offenses

§ 11.3 Judges.

(a) A Court of Indian Offenses established for any reservation or group of reservations shall consist of one or more chief judges, whose duties shall be regular and permanent, and two or more associate judges, who may be called to service when occasion requires, and who shall be compensated on a per diem basis.

(b) Each judge shall be appointed by the Commissioner of Indian Affairs, subject to confirmation by a two-thirds vote of the tribal council.

(c) Each judge shall hold office for a period of 4 years, unless sooner removed for cause or by reason of the abolition of the said office, but shall be eligible for reappointment.

(d) A person shall be eligible to serve as judge of a Court of Indian Offenses only if he (1) is a member of a tribe under the jurisdiction of the said court; and (2) has never been convicted of a felony, or, within 1 year then last past, of a misdemeanor.

(e) No judge shall be qualified to act as such in any case wherein he has

any direct interest or wherein any relative by marriage or blood, in the first or second degrees, is a party.

(f) On any reservation where no permanent Court of Indian Offenses has been established under this section, a provisional court may be established, with powers equal to those of a permanent court. Such court shall be established by detailing a judge from another reservation, upon request of the tribal council of the reservation desiring his services. Such detail shall be made by the superintendent of the reservation where the judge regularly presides: *Provided*, That where the judge to be detailed is paid from tribal funds the consent of the tribal council of such tribe shall be obtained for the detail. No detail shall extend beyond 1 year, but any detail may be renewed for additional periods unless such renewal is disapproved by the tribal council which requested or approved the detail.

§ 11.4 Removal of judges.

Any judge of the Court of Indian Offenses may be suspended, dismissed or removed, by the Commissioner of Indian Affairs, for cause, upon the recommendation of the tribal council.

§ 11.5 Court procedure.

(a) Sessions of the Court of Indian Offenses for the trial of cases shall be held by the chief judge, or, in case of his disability, by one of the associate judges selected for the occasion by all of the judges.

(b) The time and place of court sessions, and all other details of judicial procedure not prescribed by the regulations in this part, shall be laid down in rules of court approved by the tribal council and by the superintendent of the reservation.

(c) It shall be the duty of the judges of each Court of Indian Offenses to make recommendations to the tribal council for the enactment or amendment of such rules of court in the interests of improved judicial procedure.

§ 11.6 Appellate proceedings.

All the judges of the reservation shall sit together, at such times and at such places as they may find proper and necessary for the dispatch of business, to hear appeals from judgments made by any judge at the trial sessions. There shall be established by rule of court the limitations, if any, to be placed upon the right of appeal both as to the types of cases which may be appealed and as to the manner in which appeals may be granted according to the needs of their jurisdiction. In the absence of such rule of court any party aggrieved by a judgment may appeal to the full court upon giving notice of such appeal at the time of judgment and upon giving proper assurance to the trial judge, through the posting of a bond or in any other manner, that he will satisfy the judgment if it is affirmed. In any case where a party has perfected his right to appeal as established herein or by rule of court, the judgment of the trial judge shall not be executed until after final disposition of the case by the full court. The full court may render judgment upon the case by majority vote.

§ 11.6C Appellate proceedings.

All the judges of the reservation, except the trial judge, shall sit together, at such times and at such places as they may find proper and necessary for the dispatch of business, to hear appeals from judgments made by any judge at the trial sessions, and such tribunal shall be known as the Crow Tribal Court of Appeals. There shall be established by rule of court the limitations, if any, to be placed upon the right of appeal both as to the types of cases which may be appealed and as to the manner in which appeals may be granted, according to the needs of their jurisdiction. In the absence of such rule of court any party aggrieved by a judgment may appeal to the full court upon giving notice of such appeal at the time of judgment and upon giving proper assurance to the trial judge, through the posting of a bond or in any other manner, that he will satisfy the judgment if it is affirmed. In any case where a party has perfected his right to appeal as established in this section or by rule of court, the judgment of the trial judge shall not be executed until after final disposition of the case by the full

court. The full court may render judgment upon the case by majority vote.

§ 11.7 Juries.

(a) In any case where, upon preliminary hearing by the court, a substantial question of fact is raised, the defendant may demand a jury trial.

(b) A list of eligible jurors shall be prepared by the tribal council each year.

(c) In any case, a jury shall consist of six residents of the vicinity in which the trial is held, selected from the list of eligible jurors by the judge. Any party to the case may challenge not more than three members of the jury panel so chosen.

(d) The judge shall instruct the jury in the law governing the case and the jury shall bring a verdict for the complainant or the defendant. The judge shall render judgment in accordance with the verdict and existing law. If the jury is unable to reach a unanimous verdict, verdict may be rendered by a majority vote.

(e) Each juror who serves upon a jury shall be entitled to a fee not less than the hourly minimum wage scale established by 29 U.S.C. 206(a)(1), and any of its subsequent revisions, plus fifteen cents per mile travel costs. Each juror shall receive pay for a full day (8 hours) for any portion of a day served, plus travel allowance.

[22 FR 10515, Dec. 24, 1957, as amended at 41 FR 5280, Feb. 5, 1976]

§ 11.7C Juries.

(a) In any case where, upon preliminary hearing by the court, a substantial question of fact is raised, the defendant may demand a jury trial.

(b) A list of eligible jurors shall be prepared by the tribal council each year.

(c) In any case, a jury shall be drawn from the list of eligible jurors by the judge. Any party to the case may challenge not more than three members of the jury panel so chosen.

(d) The judge shall instruct the jury in the law governing the case and the jury shall bring a verdict for the complainant or the defendant. The judge shall render judgment in accordance with the verdict and existing law. If the jury is unable to reach a unanimous verdict, the verdict may be rendered by a two-thirds majority vote.

(e) Each juror who serves upon a jury shall be entitled to a fee not less than the hourly minimum wage scale established by 29 U.S.C. 206(a)(1), and any of its subsequent revisions, plus fifteen cents per mile travel costs. Each juror shall receive pay for a full day (8 hours) for any portion of a day served, plus travel allowance.

[22 FR 10515, Dec. 24, 1957, as amended at 41 FR 5280, Feb. 5, 1976]

§ 11.8 Witnesses.

(a) The several judges of the Courts of Indian Offenses shall have the power to issue subpenas for the attendance of witnesses either on their own motion or on the request of the police commissioner or superintendent or any of the parties to the case, which subpena shall bear the signature of the judge issuing it. Each witness answering such subpena shall be entitled to a fee not less than the hourly minimum wage scale established by 29 U.S.C. 206(a)(1) and any of its subsequent revisions, plus actual cost of travel. Each witness testifying at a hearing shall receive pay for a full day (8 hours), plus travel allowance. Failure to obey such subpena shall be deemed an offense as provided in § 11.73. Service of such subpenas shall be by a regularly acting member of the Indian police or by an Indian appointed by the court for that purpose.

(b) Witnesses who testify voluntarily shall be paid by the party calling them if the court so directs, their actual traveling and living expenses incurred in the performance of their function.

[22 FR 10515, Dec. 24, 1957, as amended at 41 FR 5280, Feb. 5, 1976]

§ 11.10 Clerks.

The superintendent shall detail a clerk of court for each Court of Indian Offenses. The clerk of the Court of Indian Offenses shall render assistance to the court, to the police force of the reservation and to individual members of the tribe in the drafting of complaints, subpenas, warrants and commitments and any other documents incidental to the lawful functions of the court. It shall be the fur-

ther duty of said clerk to attend and to keep a written record of all proceedings of the court, to administer oaths to witnesses, to collect all fines paid and to pay out all fees authorized by the regulations in this part, and to make an accounting thereof to the disbursing agent of the reservation and to the tribal council.

§ 11.11 Records.

Each Court of Indian Offenses shall be required to keep, for inspection by duly qualified officials, a record of all proceedings of the court, which record shall reflect the title of the case, the names of the parties, the substance of the complaint, the names and addresses of all witnesses, the date of the hearing or trial, by whom conducted, the findings of the court or jury, and the judgment, together with any other facts or circumstances deemed of importance to the case. A record of all proceedings shall be kept at the agency office, as required by 25 U.S.C. 200.

§ 11.12 Copies of laws.

(a) Each Court of Indian Offenses shall be provided with copies of all Federal and State laws and regulations of the Bureau of Indian Affairs applicable to the conduct of Indians within the reservation.

(b) Whenever the court is in doubt as to the meaning of any law, treaty or regulation it may request the superintendent to furnish an opinion on the point in question.

§ 11.13 Complaints.

No complaint filed in any Court of Indian Offenses shall be valid unless it shall bear the signature of the complainant or complaining witness, witnessed by a duly qualified judge of the Court of Indian Offenses or by the superintendent or by any other qualified employee of such reservation.

§ 11.14 Warrants to apprehend.

Every judge of a Court of Indian Offenses shall have the authority to issue warrants to apprehend, said warrants to issue in the discretion of the court only after a written complaint shall have been filed, bearing the signature of the complaining witness. Service of such warrants shall be made by a duly qualified member of the Indian police or other police officer of the United States Indian Service. No warrant to apprehend shall be valid unless it shall bear the signature of a duly qualified judge of the Court of Indian Offenses.

§ 11.15 Arrests.

No member of the Indian police shall arrest any person for any offense defined by §§ 11.38 through 11.87H or by Federal law, except when such offense shall occur in the presence of the arresting officer or he shall have reasonable evidence that the person arrested has committed an offense or the officer shall have a warrant commanding him to apprehend such person.

§ 11.16 Search warrants.

(a) Every judge of the Court of Indian Offenses of any Indian reservation shall have authority to issue warrants for search and seizure of the premises and property of any person under the jurisdiction of said court. However, no warrant of search and seizure shall issue except upon a duly signed and written complaint based upon reliable information or belief and charging the commission of some offense against the tribe. No warrant for search and seizure shall be valid unless it contains the name or description of the person or property to be searched and describes the articles or property to be seized and bears the signature of a duly qualified judge of the Court of Indian Offenses. Service of warrants of search and seizure shall be made only by members of the Indian police or police officers of the Bureau of Indian Affairs.

(b) No policeman shall search or seize any property without a warrant unless he shall know, or have reasonable cause to believe, that the person in possession of such property is engaged in the commission of an offense under the regulations in this part. Unlawful search or seizure will be deemed trespass and punished in accordance with § 11.52.

§ 11.17 Commitments.

No Indian shall be detained, jailed or imprisoned under the regulations in this part for a longer period than 36 hours unless there be issued a commitment bearing the signature of a duly qualified judge of the Court of Indian Offenses. There shall be issued, for each Indian held for trial, a temporary commitment and for each Indian held after sentence a final commitment on the prescribed forms.[1]

§ 11.18 Bail or bond.

Every Indian charged with an offense before any Court of Indian Offenses may be admitted to bail. Bail shall be by two reliable members of any Indian tribe who shall appear before a judge of the Court of Indian Offenses where complaint has been filed and there execute an agreement in compliance with the form provided therefor and made a part of the regulations in this part. In no case shall the penalty specified in the agreement exceed twice the maximum penalty set by §§ 11.38 through 11.87H for violation of the offense with which the accused is charged.

§ 11.19 Definition of signature.

The term "signature" as used in the regulations in this part shall be defined as the written signature, official seal, or the witnessed thumb print or mark of any individual.

§ 11.20 Definition of tribal council.

The term "tribal council," as used in the regulations in this part, shall be construed to refer to the council, business committee or other organization recognized by the Department of the Interior as representing the tribe, or where no such body is recognized, to the adult members of the tribe in council assembled.

§ 11.20C Definition of tribal council.

The term "tribal council," as used in the regulations in this part, shall be construed to refer to the Crow tribal council.

[1]Forms may be obtained from the Commissioner of Indian Affairs, Washington, D.C.

§ 11.21 Cooperation by Federal employees.

(a) No field employee of the Indian Service shall obstruct, interfere with or control the functions of any Court of Indian Offenses, or influence such functions in any manner except as permitted by the regulations in this part or in response to a request for advice or information from the court.

(b) Employees of the Bureau of Indian Affairs, particularly those who are engaged in social service, health and educational work, shall assist the court, upon its request, in the preparation and presentation of the facts in the case and in the proper treatment of individual offenders.

Civil Actions

§ 11.22 Jurisdiction.

The Court of Indian Offenses shall have jurisdiction of all suits wherein the defendant is a member of the tribe or tribes within their jurisdiction, and of all other suits between members and nonmembers which are brought before the courts by stipulation of both parties. No judgment shall be given on any suit unless the defendant has actually received notice of such suit and ample opportunity to appear in court in his defense. Evidence of the receipt of the notice shall be kept as part of the record in the case. In all civil suits the complainant may be required to deposit with the clerk of the court a fee or other security in a reasonable amount to cover costs and disbursements in the case.

§ 11.22C Jurisdiction.

The Court of Indian Offenses shall have jurisdiction of all suits wherein the parties to the action are members of the tribe or tribes within their jurisdiction, and of all other suits between members and nonmembers which are brought before the courts by stipulation of both parties. No judgment shall be given on any suit unless the defendant has actually received notice of such suit and ample opportunity to appear in court in his defense. Evidence of the receipt of the notice shall be kept as part of the record in the case. In all civil suits the complainant may be required to deposit with the

BEST AVAILA

clerk of the court a fee or other security in a reasonable amount to cover costs and disbursements in the case.

§ 11.23 Law applicable to civil actions.

(a) In all civil cases the Court of Indian Offenses shall apply any laws of the United States that may be applicable, any authorized regulations of the Interior Department, and any ordinances or customs of the tribe, not prohibited by such Federal laws.

(b) Where any doubt arises as to the customs and usages of the tribe the court may request the advice of counsellors familiar with these customs and usages.

(c) Any matters that are not covered by the traditional customs and usages of the tribe, or by applicable Federal laws and regulations, shall be decided by the Court of Indian Offenses according to the laws of the State in which the matter in dispute may lie.

§ 11.24 Judgments in civil actions.

(a) In all civil cases, judgment shall consist of an order of the court awarding money damages to be paid to the injured party, or directing the surrender of certain property to the injured party, or the performance of some other act for the benefit of the injured party.

(b) Where the injury inflicted was the result of carelessness of the defendant, the judgment shall fairly compensate the injured party for the loss he has suffered.

(c) Where the injury was deliberately inflicted, the judgment shall impose an additional penalty upon the defendant, which additional penalty may run either in favor of the injured party or in favor of the tribe.

(d) Where the injury was inflicted as the result of accident, or where both the complainant and the defendant were at fault, the judgment shall compensate the injured party for a reasonable part of the loss he has suffered.

§ 11.24C Judgments in civil actions.

(a) In all civil cases, judgment shall consist of an order of the court awarding money damages to be paid to the injured party, or directing the surrender of certain property to the injured party, or the performance of some other act for the benefit of the injured party.

(b) Where the injury inflicted was the result of carelessness of the defendant, the judgment shall fairly compensate the injured party for the loss he has suffered.

(c) Where the injury was deliberately inflicted, the judgment shall impose an additional penalty upon the defendant, which additional penalty may run either in favor of the injured party or in favor of the tribe.

(d) Where the injury was inflicted as the result of accident, or where both the complainant and the defendant were at fault, the judgment may compensate the injured party for a reasonable part of the loss he has suffered.

§ 11.25 Costs in civil actions.

The court may assess the accruing costs of the case against the party or parties against whom judgment is given. Such costs shall consist of the expenses of voluntary witnesses for which either party may be responsible under § 11.8 and the fees of jurors in those cases where a jury trial is had, and any further incidental expenses connected with the procedure before the court as the court may direct.

§ 11.26 Payment of judgments from individual Indian moneys.

(a) Whenever the Court of Indian Offenses shall have ordered payment of money damages to an injured party and the losing party refuses to make such payment within the time set for payment by the court, and when the losing party has sufficient funds to his credit at the agency office to pay all or part of such judgment, the superintendent shall certify to the Secretary of the Interior the record of the case and the amount of the available funds. If the Secretary shall so direct, the disbursing agent shall pay over to the injured party the amount of the judgment, or such lesser amount as may be specified by the Secretary, from the account of the delinquent party.

(b) A judgment shall be considered a lawful debt in all proceedings held by the Department of the Interior or by the Court of Indian Offenses to distribute decedents' estates.

ABLE COPY

CROSS REFERENCE: For individual Indian money regulations, see Part 115 of this chapter.

§ 11.26C Payment of judgments from individual Indian moneys.

(a) Whenever the Court of Indian Offenses shall have ordered payment of money damages to an injured party and the losing party refuses to make such payment within the time set for payment by the court, and when the losing party has sufficient funds to his credit at the agency office to pay all or part of such judgment, the superintendent shall certify to the Secretary of the Interior the record of the case and the amount of the available funds. If the Secretary shall so direct, the disbursing agent shall pay over to the injured party the amount of the judgment, or such lesser amount as may be specified by the Secretary, from the account of the delinquent party.

(b) A judgment shall be considered a lawful debt in all proceedings held by the Department of the Interior or by the Court of Indian Offenses to distribute decedents' estates.

(c) No recovery may be had after 5 years from date of final judgment in any suit unless such judgment shall have been renewed before date of expiration.

CROSS REFERENCE: For individual Indian money regulations, see Part 115 of this chapter.

DOMESTIC RELATIONS

§ 11.27 Recording of marriages and divorces.

All Indian marriages and divorces, whether consummated in accordance with the State law or in accordance with tribal custom, shall be recorded within 3 months at the agency of the jurisdiction in which either or both of the parties reside.

§ 11.28 Tribal custom marriage and divorce.

(a) The Tribal council shall have authority to determine whether Indian custom marriage and Indian custom divorce for members of the tribe shall be recognized in the future as lawful marriage and divorce upon the reservation, and if it shall be so recognized, to determine what shall constitute such marriage and divorce and whether action by the Court of Indian Offenses shall be required. When so determined in writing, one copy shall be filed with the Court of Indian Offenses, one copy with the superintendent in charge of the reservation, and one copy with the Commissioner of Indian Affairs. Thereafter Indians who desire to become married or divorced by the custom of the tribe shall conform to the custom of the tribe as determined. Indians who assume or claim a divorce by Indian custom shall not be entitled to remarry until they have complied with the determined custom of their tribe nor until they have recorded such divorce at the agency office.

(b) Pending any determination by the tribal council on these matters, the validity of Indian custom marriage and divorce shall continue to be recognized as heretofore.

§ 11.29 Tribal custom adoption.

The tribal council shall likewise have authority to determine whether Indian custom adoption shall be permitted upon the reservation among members of the tribe, and if permitted, to determine what shall constitute such adoption and whether action by the Court of Indian Offenses shall be required. The determination of the tribal council shall be filed with the Court of Indian Offenses, with the superintendent of the reservation and with the Commissioner of Indian Affairs. Thereafter all members of the tribe desiring to adopt any person shall conform to the procedure fixed by the tribal council.

§ 11.29C Adoption.

No future adoptions among or by the Crow Indians shall be recognized except those made in accordance with the act of March 3, 1931 (46 Stat. 1494).

§ 11.30 Determination of paternity and support.

The Court of Indian Offenses shall have jurisdiction of all suits brought to determine the paternity of a child and to obtain a judgment for the support of the child. A judgment of the

court establishing the identity of the father of the child shall be conclusive of that fact in all subsequent determinations of inheritance by the Department of the Interior or by the Court of Indian Offenses.

§ 11.31 Determination of heirs.

(a) When any member of the tribe dies leaving property other than an allotment or other trust property subject to the jurisdiction of the United States, any member claiming to be an heir of the decedent may bring a suit in the Court of Indian Offenses to have the court determine the heirs of the decedent and to divide among the heirs such property of the decedent. No determination of heirs shall be made unless all the possible heirs known to the court, to the superintendent, and to the claimant have been notified of the suit and given full opportunity to come before the court and defend their interests. Possible heirs who are not residents of the reservation under the jurisdiction of the court must be notified by mail and a copy of the notice must be preserved in the record of the case.

(b) In the determination of heirs the court shall apply the custom of the tribe as to inheritance if such custom is proved. Otherwise the court shall apply State law in deciding what relatives of the decedent are entitled to be his heirs.

(c) Where the estate of the decedent includes any interest in restricted allotted lands or other property held in trust by the United States, over which the administrative law judge would have jurisdiction, the Court of Indian Offenses may distribute only such property as does not come under the jurisdiction of the administrative law judge, and the determination of heirs by the court may be reviewed, on appeal, and the judgment of the court modified or set aside by the said administrative law judge, with the approval of the Secretary of the Interior, if law and justice so require.

CROSS REFERENCE: For regulations governing the jurisdiction of the administrative law judge concerning the determination of heirs, see Part 15 of this chapter.

§ 11.31C Determination of heirs.

The superintendent of the Crow Reservation shall have authority to protect, impound or convert into cash, for the benefit of the estate, any personal property which may be left by any decedent who is an enrolled member of the Crow Tribe, pending final determination of the heirs of said decedent by the Secretary of the Interior, and in accordance with existing law and regulations.

§ 11.32 Approval of wills.

When any member of the tribe dies, leaving a will disposing only of property other than an allotment or other trust property subject to the jurisdiction of the United States, the Court of Indian Offenses shall, at the request of any member of the tribe named in the will or any other interested party, determine the validity of the will after giving notice and full opportunity to appear in court to all persons who might be heirs of the decedent, as under § 11.31. A will shall be deemed to be valid if the decedent had a sane mind and understood what he was doing when he made the will and was not subject to any undue influence of any kind from another perons, and if the will was made in accordance with a proved tribal custom or made in writing and signed by the decedent in the presence of two witnesses who also sign the will. If the court determines the will to be validly executed, it shall order the property described in the will to be given to the persons named in the will or to their heirs; but no distribution of property shall be made in violation of a proved tribal custom which restricts the privilege of tribal members to distribute property by will.

CROSS REFERENCE: For regulations governing the jurisdiction of the administrative law judge concerning the approval of wills, heirs, see Part 15 of this chapter.

§ 11.32C Approval of wills.

The determination of the validity of wills shall be made by the Secretary of the Interior as provided in Part 15 of this chapter.

SENTENCES

§ 11.33 Nature of sentences.

(a) Any Indian who has been convicted by the Court of Indian Offenses of violation of a provision of §§ 11.38 through 11.84H shall be sentenced by the court to work for the benefit of the tribe for any period found by the court to be appropriate; but the period fixed shall not exceed the maximum period set for the offense in the code, and shall begin to run from the day of the sentence. During the period of sentence the convicted Indian may be confined in the agency jail if so directed by the court. The work shall be done under the supervision of the superintendent or an authorized agent or committee of the tribal council as the court may provide.

(b) Whenever any convicted Indian shall be unable or unwilling to work, the court shall, in its discretion, sentence him to imprisonment for the period of the sentence or to pay a fine equal to $2 a day for the same period. Such fine shall be paid in cash, or in commodities or other personal property of the required value as may be directed by the court. Upon the request of the convicted Indian, the disbursing agent may approve a disbursement voucher chargeable to the Indian's account to cover payment of the fine imposed by the court.

(c) In addition to any other sentence, the court may require an offender who has inflicted injury upon the person or property of any individual to make restitution or to compensate the party injured, through the surrender of property, the payment of money damages, or the performance of any other act for the benefit of the injured party.

(d) In determining the character and duration of the sentence which shall be imposed, the court shall take into consideration the previous conduct of the defendant, the circumstances under which the offense was committed, and whether the offense was malicious or willful and whether the offender has attempted to make amends, and shall give due consideration to the extent of the defendant's resources and the needs of his dependents. The penalties listed in §§ 11.38 through 11.87H are maximum penalties to be inflicted only in extreme cases.

§ 11.34 Probation.

(a) Where sentence has been imposed upon any Indian who has not previously been convicted of any offense, the Court of Indian Offenses may in its discretion suspend the sentence imposed and allow the offender his freedom on probation upon his signing a pledge of good conduct during the period of the sentence upon the form provided therefor.

(b) Any Indian who shall violate his probation pledge shall be required to serve the original sentence plus an additional half of such sentence as penalty for the violation of his pledge.

§ 11.34C Probation.

(a) Where sentence has been imposed upon any Indian, the Court of Indian Offenses may in its discretion suspend the sentence imposed and allow the offender his freedom on probation, upon his signing a pledge of good conduct during the period of the sentence.

(b) Any Indian who shall violate his probation pledge shall be required to serve the original sentence plus an additional half of such sentence as penalty for the violation of his pledge.

§ 11.35 Parole.

(a) Any Indian committed by a Court of Indian Offenses who shall have without misconduct served one-half the sentence imposed by such court shall be eligible to parole. Parole shall be granted only by a judge of the Court of Indian Offenses where the prisoner was convicted and upon the signing of the form provided therefor.

(b) Any Indian who shall violate any of the provisions of such parole shall be punished by being required to serve the whole of the original sentence.

§ 11.36 Juvenile delinquency.

Whenever any Indian who is under the age of 18 years is accused of committing one of the offenses enumerated in §§ 11.38 through 11.87H, the judge may in his discretion hear and determine the case in private and in an informal manner, and, if the ac-

93-0776 O—87——2

cused is found to be guilty, may in lieu of sentence place such delinquent for a designated period under the supervision of a responsible person selected by him or may take such other action as he may deem advisable in the circumstances.

§ 11.36C Juvenile delinquency.

(a) Whenever any Indian who is under the age of 18 years is accused of committing one of the offenses enumerated in §§ 11.38 through 11.75C, the judge may in his discretion hear and determine the case in private and in an informal manner, and, if the accused is found to be guilty, may in lieu of sentence, place such delinquent for a designated period under the supervision of a responsible person selected by him or may take such other action as he may deem advisable in the circumstances.

(b) In the absence of either parent or guardian, the court shall appoint a suitable person to represent the delinquent child.

§ 11.37 Disposition of fines.

(a) All money fines imposed for the commission of an offense shall be in the nature of an assessment for the payment of designated court expenses. Such expenses shall include the payment of the fees provided for in the regulations in this part to jurors and to witnesses answering a subpena. The fines assessed shall be paid over by the clerk of the court to the disbursing agent of the reservation for deposit as a "special deposit, court funds" to the disbursing agent's official credit in the Treasury of the United States. The disbursing agent shall withdraw such funds, in accordance with existing regulations, upon the order of the clerk of the court signed by a judge of the court for the payment of specified fees to specified jurors or witnesses. The disburising agent and the clerk of the court shall keep an accounting of all such deposits and withdrawals for the inspection of any person interested. Whenever such fund shall exceed the amount necessary with a reasonable reserve for the payment of the court expenses before mentioned, the tribal council shall designate, with the approval of the superintendent, further expenses of the work of the court which shall be paid by these funds, such as the writing of records, the costs of notices or the increase of fees, whether or not any such costs were previously paid from other sources.

(b) Wherever a fine is paid in commodities, the commodities shall be turned over under the supervision of the clerk of the court to the custody of the superintendent to be sold or, if the tribal council so directs, to be disposed of in other ways for the benefit of the tribe. The proceeds of any sale of such commodities shall be deposited by the disbursing agent in the special deposit for court funds and recorded upon the accounts.

CODE OF INDIAN TRIBAL OFFENSES

§ 11.38 Assault.

Any Indian who shall attempt or threaten bodily harm to another person through unlawful force or violence shall be deemed guilty of assault, and upon conviction thereof shall be sentenced to labor for a period not to exceed 5 days or shall be required to furnish a satisfactory bond to keep the peace.

§ 11.39 Assault and battery.

Any Indian who shall willfully strike another person or otherwise inflict bodily injury, or who shall by offering bodily injury, or who shall by offering violence cause another to harm himself shall be deemed guilty of assault and battery and upon conviction thereof shall be sentenced to labor for a period not to exceed 6 months.

§ 11.40 Carrying concealed weapons.

Any Indian who shall go about in public places armed with a dangerous weapon concealed upon his person, unless he shall have a permit signed by a judge of a Court of Indian Offenses and countersigned by the superintendent of the reservation, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 30 days; and the weapons so carried may be confiscated.

§ 11.41 Abduction.

Any Indian who shall willfully take away or detain another person against his will or without the consent of the parent or other person having lawful care or charge of him, shall be deemed guilty of abduction and upon conviction thereof shall be sentenced to labor for a period not to exceed 6 months.

§ 11.42 Theft.

Any Indian who shall take the property of another person, with intent to steal, shall be deemed guilty of theft and upon conviction thereof shall be sentenced to labor for a period not to exceed 6 months.

§ 11.43 Embezzlement.

Any Indian who shall, having lawful custody of property not his own, appropriate the same to his own use with intent to deprive the owner thereof, shall be deemed guilty of embezzlement and upon conviction thereof shall be sentenced to labor for a period not to exceed 6 months.

§ 11.44 Fraud.

Any Indian who shall by willful misrepresentation or deceit, or by false interpreting, or by the use of false weights or measures obtain any money or other property, shall be deemed guilty of fraud and upon conviction thereof shall be sentenced to labor for a period not to exceed 6 months.

§ 11.45 Forgery.

Any Indian who shall, with intent to defraud, falsely sign, execute or alter any written instrument, shall be deemed guilty of forgery and upon conviction thereof shall be sentenced to labor for a period not to exceed 6 months.

§ 11.46 Misbranding.

Any Indian who shall knowingly and willfully misbrand or alter any brand or mark on any livestock of another person, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 6 months.

§ 11.47 Receiving stolen property.

Any Indian who shall receive or conceal or aid on concealing or receiving any property, knowing the same to be stolen, embezzled, or obtained by fraud or false pretense, robbery or burglary, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 3 months.

§ 11.48 Extortion.

Any Indian who shall willfully, by making false charges against another person or by any other means whatsoever, extort or attempt to extort any moneys, goods, property, or anything else of any value, shall be deemed guilty of extortion and upon conviction thereof shall be sentenced to labor for a period not to exceed 30 days.

§ 11.49 Disorderly conduct.

Any Indian who shall engage in fighting in a public place, disturb or annoy any public or religious assembly, or appear in a public or private place in an intoxicated and disorderly condition, or who shall engage in any other act of public indecency or immorality, shall be deemed guilty of disorderly conduct and upon conviction thereof shall be sentenced to labor for a period not to exceed 30 days.

§ 11.50 Reckless driving.

Any Indian who shall drive or operate any automobile, wagon, or any other vehicle in a manner dangerous to the public safety, shall be deemed guilty of reckless driving and upon conviction thereof shall be sentenced to labor for a period not to exceed 15 days and may be deprived of the right to operate any automobile for a period not to exceed 6 months. For the commission of such offense while under the influence of liquor, the offender may be sentenced to labor for a period not to exceed 3 months.

§ 11.50C Reckless driving.

Any Indian who shall drive or operate any automobile, wagon, or any other vehicle in a manner dangerous to the public safety, shall be deemed guilty of reckless driving and upon

conviction thereof shall be sentenced to labor for a period not to exceed 15 days and may be deprived of the right to operate any automobile for a period not to exceed 6 months. For the commission of such offense while under the influence of liquor, the offender may be sentenced for the first offense to labor for a period not to exceed 3 months and for a second or subsequent offense for a period not to exceed 6 months and may be deprived of his right to operate any motor vehicle for a period of 1 year.

§ 11.50ME Traffic violations.

Until such time as the Menominee Tribe enacts its own traffic code, the provisions of the Wisconsin State Traffic Laws (Chapter 346, Title 32 of Wisconsin Statutes) are hereby applicable to the operation of motor vehicles on the Menominee Reservation with the exception that any Indian found guilty of violating such laws shall, in lieu of the penalties provided by State law, be sentenced to labor for a period not to exceed six (6) months and may be deprived of the right to operate any motor vehicle for a period not to exceed six (6) months.

(5 U.S.C. 301 and 25 U.S.C. 2)

[43 FR 40805, Sept. 13, 1978]

§ 11.51 Malicious mischief.

Any Indian who shall maliciously disturb, injure or destroy any livestock or other domestic animal or other property, shall be deemed guilty of malicious mischief and upon conviction thereof shall be sentenced to labor for a period not to exceed 6 months.

§ 11.52 Trespass.

Any Indian who shall go upon or pass over any cultivated or enclosed lands of another person and shall refuse to go immediately therefrom on the request of the owner or occupant thereof or who shall willfully and knowingly allow livestock to occupy or graze on the cultivated or enclosed lands, shall be deemed guilty of an offense and upon conviction shall be punished by a fine not to exceed $5, in addition to any award of damages for the benefit of the injured party.

§ 11.53 Injury to public property.

Any Indian who shall, without proper authority, use or injure any public property of the tribe or the United States, shall be deemed guilty of the offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 30 days.

§ 11.54 Maintaining a public nuisance.

Any Indian who shall act in such a manner, or permit his property to fall into such condition as to injure or endanger the safety, health, comfort, or property of his neighbors, shall be deemed guilty of offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 5 days, and may be required to remove such nuisance when so ordered by the court.

§ 11.55 Liquor violations.

Any Indian who shall possess, sell, trade, transport or manufacture any beer, ale, wine, whisky or any article whatsoever which produces alcoholic intoxication, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 60 days.

§ 11.55ME Liquor violations.

Until such time as the Menominee Tribe enacts its own liquor control ordinance, the provisions of the Wisconsin State laws found in Wis. Ann. §§ 176.01 through 176.91 relating to liquor control, are hereby incorporated by reference and made applicable to the buying, selling, and consumption of alcoholic beverages on the Menominee Reservation, with the exception that any Indian found guilty of violating such law shall, in lieu of the penalties provided by State law, be sentenced to labor for a period not to exceed sixty (60) days.

(5 U.S.C. 301 and 25 U.S.C. 2)

[43 FR 40805, Sept. 13, 1978]

§ 11.56 Cruelty to animals.

Any Indian who shall torture or cruelly mistreat any animal, shall be deemed guilty of an offense and shall be sentenced to labor for a period not to exceed 30 days.

§ 11.57 Game violations.

Any Indian who shall violate any law, rule or regulation adopted by the tribal council for the protection or conservation of the fish or game of the reservation, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 30 days; and he shall forfeit to the court for the use of any Indian institution such game as may be found in his possession.

§ 11.58 Gambling.

Any Indian who shall violate any law, rule or regulation adopted by the tribal council for the control or regulation of gambling on any reservation, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 30 days.

§ 11.59 Adultery.

Any Indian who shall have sexual intercourse with another person, either of such persons being married to a third person, shall be deemed guilty of adultery and upon conviction thereof shall be sentenced to labor for a period not to exceed 30 days.

§ 11.60C Fornication.

Any Indian who shall have sexual intercourse with another person, neither of such persons being married, shall be deemed guilty of fornication and upon conviction thereof shall be sentenced to labor for a period of not to exceed 25 days.

§ 11.61 Illicit cohabitation.

Any Indian who shall live or cohabit with another as man and wife not then and there being married shall be deemed guilty of illicit cohabitation and upon conviction thereof shall be sentenced to labor for a period not to exceed 30 days.

§ 11.62 Prostitution.

Any Indian who shall practice prostitution or who shall knowingly keep, maintain, rent or lease, any house, room, tent, or other place for the purpose of prostitution shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 6 months.

§ 11.63 Giving veneral disease to another.

Any Indian who shall infect another person with a venereal disease shall be deemed guilty of an offense, and upon conviction thereof shall be sentenced to labor for a period not to exceed 3 months. The Court of Indian Offenses shall have authority to order and compel the medical examination and treatment of any person charged with violation of this section or found to be afflicted with any communicable disease of this nature.

§ 11.63C Giving venereal disease to another.

Any Indian who shall infect another person with a venereal disease shall be deemed guilty of an offense, and upon conviction thereof shall be sentenced to labor for a period not to exceed 3 months. The Court of Indian Offenses shall have authority to order and compel the medical examination and treatment of any person charged with violation of this section or found to be afflicted with any communicable disease.

§ 11.64 Failure to support dependent persons.

Any Indian who shall, because of habitual intemperance or gambling or for any other reason, refuse or neglect to furnish food, shelter, or care to those dependent upon him, including any dependent children born out of wedlock, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 3 months, for the benefit of such dependent.

§ 11.64C Failure to support dependent persons.

(a) Any Indian who shall, because of habitual intemperance or gambling or for any other reason, refuse or neglect to furnish food, shelter, or care to those dependent upon him, including any dependent children born out of wedlock, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a

period not to exceed 3 months, for the benefit of such dependent.

(b) The Court of Indian Offenses shall also have authority to order and compel the payment of all alimony lawfully awarded in any divorce proceeding by any State court having jurisdiction, and nonpayment of such awards shall be accepted as conclusive evidence of failure to provide for dependent persons under this section: *Provided, however,* That an appeal may be taken to the Tribal Court of Appeals whose decision shall be final.

§ 11.65 Failure to send children to school.

Any Indian who shall, without good cause, neglect or refuse to send his children or any children under his care, to school shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 10 days.

CROSS REFERENCE: For regulations pertaining to the education of Indians, see Parts 27, 31 through 33, and 38 through 42 of this chapter.

§ 11.66 Contributing to the delinquency of a minor.

Any Indian who shall willfully contribute to the delinquency of any minor shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 6 months.

§ 11.67 Bribery.

Any Indian who shall give or offer to give any money, property or services, or anything else of value to another person with corrupt intent to influence another in the discharge of his public duties or conduct, and any Indian who shall accept, solicit or attempt to solicit any bribe, as above defined, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 6 months; and any tribal office held by such person shall be forfeited.

§ 11.68 Perjury.

Any Indian who shall willfully and deliberately, in any judicial proceeding in any Court of Indian Offenses, falsely swear or interpret, or shall make a sworn statement or affidavit knowing the same to be untrue, or shall induce or procure another person so to do, shall be deemed guilty of perjury and upon conviction thereof shall be sentenced to labor for a period not to exceed 6 months.

§ 11.69 False arrest.

Any Indian who shall willfully and knowingly make, or cause to be made, the unlawful arrest, detention or imprisonment of another person, shall be deemed guilty of an offense, and upon conviction thereof shall be sentenced to labor for a period not to exceed 6 months.

§ 11.70 Resisting lawful arrest.

Any Indian who shall willfully and knowingly, by force or violence, resist or assist another person to resist a lawful arrest shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 30 days.

§ 11.70ME Resisting or obstructing officers.

Until such time as the Menominee Tribe enacts its own ordinances dealing with resisting or obstructing an officer, the provisions of Wisconsin Statutes 946.41 are hereby incorporated by reference and made applicable with the exception that any Indian found guilty of violating the provisions of Wisconsin Statutes 946.41(1) shall, in lieu of the penalties therein provided, be sentenced to labor for a period not to exceed sixty (60) days.

(5 U.S.C. 301 and 25 U.S.C. 2)

[43 FR 40805, Sept. 13, 1978]

§ 11.71 Refusing to aid officer.

Any Indian who shall neglect or refuse, when called upon by any Indian police or other police officer of the Bureau of Indian Affairs, to assist in the arrest of any person charged with or convicted of any offense or in securing such offender when apprehended, or in conveying such offender to the nearest place of confinement shall be deemed guilty of an offense, and upon conviction, shall be sentenced to labor for a period not to exceed 10 days.

§ 11.72 Escape.

Any Indian, who, being in lawful custody, for any offense, shall escape or attempt to escape or who shall permit or assist or attempt to permit or assist another person to escape from lawful custody shall be deemed guilty of an offense, and upon conviction thereof shall be sentenced to labor for a period not to exceed 6 months.

§ 11.73 Disobedience to lawful orders of court.

Any Indian who shall willfully disobey any order, subpena, warrant or command duly issued, made or given by the Court of Indian Offenses or any officer thereof, shall be deemed guilty of an offense and upon conviction thereof shall be fined in an amount not exceeding $180 or sentenced to labor for a period not to exceed 3 months.

§ 11.74 Violation of an approved tribal ordinance.

Any Indian who violates an ordinance designed to preserve the peace and welfare of the tribe, which was promulgated by the tribal council and approved by the Secretary of the Interior, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced as provided in the ordinance.

§ 11.75C Limitation on filing of complaints.

No complaint shall be filed charging the commission of an offense, as defined under §§ 11.38 through 11.75C, unless such offense shall have been committed within 1 year prior to the date of the complaint.

§ 11.76H Failure to sell or remove from tribal range infectious or cull animals.

Any Indian who shall willfully refuse to dispose of cull or infectious animals indicated for removal in accordance with the instructions contained in § 89.8 of this chapter, shall be deemed guilty of an offense, and upon conviction thereof shall be sentenced to hard labor for a period of not to exceed 90 days, or a reduction of 10 percent in his grazing permit.

(5 U.S.C. 301 and 25 U.S.C. 2)

[22 FR 10515, Dec. 24, 1957. Redesignated at 43 FR 49982, Oct. 26, 1978; 44 FR 18969, Mar. 30, 1979]

§ 11.77H Introduction of livestock without permit.

Any Indian who shall introduce or cause to be introduced any livestock into unallotted lands of the reservation without a permit shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to a period of not to exceed 60 days at hard labor.

CROSS REFERENCE: For Navajo grazing regulations, see Part 167 of this chapter.

(5 U.S.C. 301 and 25 U.S.C. 2)

[22 FR 10515, Dec. 24, 1957. Redesignated at 43 FR 49982, Oct. 26, 1978]

§ 11.78H Stock trespass in form of unauthorized use of range.

Any Indian who shall willfully graze stock in excess of permitted number on tribal range, or who shall refuse to graze his livestock in accordance with range management plans which consider deferred grazing, the reservation of specific areas for seasonal use, etc., shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to hard labor for a period not to exceed 6 months, and, or, he shall be required to pay damages equal to the value of the forage consumed, salaries and expenses of employees for the time incurred in making investigation, and reports. In lieu of cash, this fine, if levied, may be collected in livestock.

CROSS REFERENCE: For Navajo grazing regulations, see Part 167 of this chapter.

(5 U.S.C. 301 and 25 U.S.C. 2)

[22 FR 10515, Dec. 24, 1957. Redesignated at 43 FR 49982, Oct. 26, 1978]

§ 11.79H Failure to dip sheep.

Any Indian who willfully refuses to dip all of his sheep and goats according to regulations when so directed by the superintendent or his authorized representative shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to hard labor for a period not to exceed 6 months or shall be subject to a fine

not to exceed $100 or both. In lieu of cash, this fine, if levied, may be collected in livestock.

(5 U.S.C. 301 and 25 U.S.C. 2)

[22 FR 10515, Dec. 24, 1957. Redesignated at 43 FR 49982, Oct. 26, 1978]

§ 11.80H Making false reports of stock owned.

Any Indian who willfully makes a false report as to the total number of stock owned, or refuses to make a true report of stock ownership, shall be deemed guilty of an offense and upon conviction thereof, shall be fined not less than $10 nor more than $100. In lieu of cash this fine may be collected in livestock.

CROSS REFERENCE: For method of making out reports of stock owned, see § 167.7 of this chapter.

(5 U.S.C. 301 and 25 U.S.C. 2)

[22 FR 10515, Dec. 24, 1957. Redesignated at 43 FR 49982, Oct. 26, 1978]

§ 11.81H Unauthorized fencing of tribal land.

Any Indian who shall willfully fence, for his own advantage, range land belonging to the tribe, without first having secured a permit from the superintendent shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to hard labor for a period not to exceed 6 months.

(5 U.S.C. 301 and 25 U.S.C. 2)

[22 FR 10515, Dec. 24, 1957. Redesignated at 43 FR 49982, Oct. 26, 1978]

§ 11.82H Inter-district trespass.

Any Indian who shall allow his stock to trespass on range allocated to others under provisions of the grazing regulations, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to hard labor for a period not to exceed 3 months or shall be subject to a fine equal to the damage done the range allocated to others, or both.

CROSS REFERENCE: For Navajo grazing regulations, see Part 167 of this chapter.

(5 U.S.C. 301 and 25 U.S.C. 2)

[22 FR 10515, Dec. 24, 1957. Redesignated at 43 FR 49982, Oct. 26, 1978]

§ 11.83H Grazing stock without permit.

Any Indian who shall allow his stock to graze on tribal land without a grazing permit shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to hard labor for a period not to exceed 3 months or shall be fined not to exceed $100 or both. In lieu of cash, this fine, if levied, may be collected in livestock.

(5 U.S.C. 301 and 25 U.S.C. 2)

[22 FR 10515, Dec. 24, 1957. Redesignated at 43 FR 49982, Oct. 26, 1978]

§ 11.84H Refusing to brand or mark livestock.

Any Indian who shall willfully refuse to brand or mark his or her livestock where such branding or marking is required in the interest of ownership identification or for other purposes or who alters obliterates or removes such brands or marks shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to hard labor for a period not to exceed 60 days.

(5 U.S.C. 301 and 25 U.S.C. 2)

[22 FR 10515, Dec. 24, 1957. Redesignated at 43 FR 49982, Oct. 26, 1978]

§ 11.85H Obstructing or interfering with livestock roundups.

Any Indian who shall interfere with or obstruct authorized roundups which have for their purpose the removal of unowned horses or other livestock, or for the purpose of determining ownership or for other purposes designed to protect tribal land from destruction, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to hard labor for a period not to exceed 6 months.

(5 U.S.C. 301 and 25 U.S.C. 2)

[22 FR 10515, Dec. 24, 1957. Redesignated at 43 FR 49982, Oct. 26, 1978]

§ 11.86H Trespass on areas reserved for demonstration purposes.

Any Indian who shall commit willful trespass on areas reserved for demonstration, administration, or agricultural purposes designed for the benefit of the tribe shall be guilty of an offense and upon conviction thereof shall be sentenced to hard labor for a period

not to exceed 60 days and shall be subject to a fine not exceeding $100, or both. In lieu of cash, this fine, if levied, may be collected in livestock.

(5 U.S.C. 301 and 25 U.S.C. 2)

[22 FR 10515, Dec. 24, 1957. Redesignated at 43 FR 49982, Oct. 26, 1978]

§ 11.87H Peyote violations.

Any Indian who shall introduce into the Navajo country, sell, use or have in his possession within said Navajo country, the bean known as peyote shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 9 months or a fine not to exceed $100, or both; *Provided*, That it shall not be unlawful for any member of the Native American Church to transport into Navajo country, buy, sell, possess, or use peyote in any form in connection with the religious practices, sacraments or services of the Native American Church.

(5 U.S.C. 301 and 25 U.S.C. 2)

[38 FR 19910, July 25, 1973. Redesignated at 43 FR 49982, Oct. 26, 1978]

§ 11.88ME Curfew.

Until such time as the Menominee Tribe enacts its own curfew ordinance, the provisions of Menominee County Ordinance No. 23A relating to curfew are hereby incorporated by reference and made applicable with the exception that any Indian parent or guardian found guilty of violating such law shall in lieu of the penalties provided by Menominee County Ordinance No. 23A be sentenced to labor for a period not to exceed five (5) days.

(5 U.S.C. 301 and 25 U.S.C. 2)

[43 FR 40805, Sept. 13, 1978]

§ 11.89ME Firearms.

Until such time as the Menominee Tribe enacts its own firearms ordinance, the provisions of the town of Menominee Ordinance No. 39 relating to the use of firearms are hereby incorporated by reference and made applicable within the unincorporated villages of Keshena, Neopit, and Zoar, according to the plats thereof and additions thereto as recorded with the Register of Deeds of Menominee County, Wis., with the exception that any Indian found guilty of violating such laws shall, in lieu of the penalties provided by the said ordinance, be sentenced to labor for a period not to exceed thirty (30) days.

(5 U.S.C. 301 and 25 U.S.C. 2)

[43 FR 40805, Sept. 13, 1978]

§ 11.90ME Keeping of livestock.

Until such time as the Menominee Tribe enacts its own ordinances dealing with the keeping of livestock, the provisions of Menominee County Zoning Ordinance, Article 6, Section 41, prohibiting the keeping of livestock within 200 feet of residential property lines are hereby incorporated by reference and made applicable with the exception that any Indian found guilty of violating such law shall, in lieu of the penalties provided by the Menominee County Zoning Ordinance, be sentenced to labor for a period not to exceed thirty (30) days.

(5 U.S.C. 301 and 25 U.S.C. 2)

[43 FR 40805, Sept. 13, 1978]

§ 11.91ME Control of dogs.

Until such time as the Menominee Tribe enacts its own ordinances regulating the keeping of dogs, the provisions of the town of Menominee Ordinance No. 1 regulating the licensing and control of dogs are hereby incorporated by reference and made applicable, with the exception that any Indian found guilty of violating such law, in lieu of the penalties provided by the said ordinance, be fined five dollars ($5.00) for the first offense and ten dollars ($10.00) for each succeeding offense.

(5 U.S.C. 301 and 25 U.S.C. 2)

[43 FR 40805, Sept. 13, 1978]

§ 11.92ME Forest fire protection.

Until such time as the Menominee Tribe enacts its own ordinances dealing with fire protection, detection, control and suppression, the provisions of the Wisconsin Administration Code, DNR Section 26.12(5)(a) requiring a written permit issued by Wisconsin Department of Natural Resources Fire Warden before any person sets any fire except for warming the

person or cooking food, are hereby incorporated by reference and made applicable to the setting of fires on the Menominee Reservation. Any Indian found guilty of failing to obtain a permit shall be sentenced to labor for a period not to exceed thirty (30) days.

(5 U.S.C. 301 and 25 U.S.C. 2)

[43 FR 40805, Sept. 13, 1978]

§ 11.93ME Possession of controlled substances.

Until such time as the Menominee Tribe enacts its own ordinances dealing with the possession of controlled substances, the provisions of Wisconsin Statutes 161.41(3) are hereby incorporated by reference and made applicable with the exception that any Indian found guilty of violating such law shall, in lieu of the penalties provided by Wisconsin Statutes 161.41(3), be sentenced to labor for a period not to exceed thirty (30) days.

(5 U.S.C. 301 and 25 U.S.C. 2)

[43 FR 40806, Sept. 13, 1978]

§ 11.94ME Garbage and rubbish.

Until such time as the Menominee Tribe enacts its own ordinances dealing with garbage, rubbish, and inflammable material, the provisions of the town of Menominee Ordinance No. 4 regulating disposal of garbage, rubbish and inflammable material are hereby incorporated by reference and made applicable with the exception that the designation of Menominee Enterprises, Inc., shall include Menominee Tribal Enterprise, that public dumps may be designated by the Menominee Tribe as well as by the town of Menominee and that any Indian found guilty of violating such law shall, in lieu of the penalties provided by town of Menominee Ordinance No. 4, be sentenced to labor for a period not to exceed five (5) days in the event of the first offense and not to exceed thirty (30) days for each succeeding violation.

(5 U.S.C. 301 and 25 U.S.C. 2)

[43 FR 40806, Sept. 13, 1978]

§ 11.95ME Extradition.

(a) Whenever the Area Director, Minneapolis Area Office, is informed and believes that an Indian has committed a crime outside the Menominee Reservation and is present on the Menominee Reservation, using it as an asylum from prosecution, the Area Director may order a police officer of the Menominee Reservation to apprehend such Indian and deliver him to the authorities seeking his arrest at the exterior boundaries of the reservation.

(b) If a person, apprehended pursuant to this section, so demands, he shall be taken by the arresting police officers to the Menominee Court of Indian Offenses where a Judge shall hold a hearing. If it appears that there is no probable cause to believe the Indian is guilty of the crime with which he is charged outside the reservation, or if it appears probable that the Indian will not receive a fair trial in the state court, the Judge shall order the Indian released from custody.

(5 U.S.C. 301 and 25 U.S.C. 2)

[43 FR 40806, Sept. 13, 1978]

§ 11.96ME Breaking and entering.

Until such time as the Menominee Tribe enacts its own breaking and entering ordinance, the provisions of Wisconsin Statutes 943.14, "Criminal trespass to dwellings," are hereby incorporated by reference and made applicable, with the exception that any Indian found guilty of violating the provisions of Wisconsin Statutes 943.14 shall, in lieu of the penalties therein provided, be sentenced to labor for a period not to exceed six (6) months.

(5 U.S.C. 301 and 25 U.S.C. 2)

[43 FR 40806, Sept. 13, 1978]

§ 11.97ME Juvenile services.

Until such time as the Menominee Tribe enacts its own juvenile code, the provisions of the Wisconsin State laws relating to juveniles, Wisconsin Statutes §§ 48.12-48.47, § 48.78, §§ 48.81-48.97, and Chapter 54, are hereby incorporated by reference and made applicable to juvenile cases arising on the Menominee Reservation. Provided, That the following statutes are not to apply: Wis. Stat. Ann. §§ 48.31, 48.32, 48.41, 48.83, and 48.89. And provided

further. That rendering of juvenile services to the Menominee Tribe shall be in accordance with the agreement entered into on March 15, 1978, between the Wisconsin Department of Health and Social Services and the Menominee Restoration Committee.

(5 U.S.C. 301 and 25 U.S.C. 2)

[43 FR 40606, Sept. 13, 1978]

§ 11.98ME Date of incorporated statutes.

All Wisconsin statutes, Menominee County ordinances, and ordinances of the town of Menominee, incorporated in §§ 11.50ME through 11.97ME shall be those in effect on the date of publication of this rulemaking, together with any amendments hereafter adopted.

(5 U.S.C. 301 and 25 U.S.C. 2)

[43 FR 40606, Sept. 13, 1978]

The Indian Police

§ 11.301 Superintendent in command.

The superintendent of each Indian reservation shall be recognized as commander of the Indian police force and will be held responsible for the general efficiency and conduct of the members thereof. It shall be the duty of the superintendent, or his duly qualified representative, to keep himself informed as to the efficiency of the Indian police in the discharge of their duties, to subject them to a regular inspection, to inform them as to their duties and keep a strict accounting of the equipment issued them in connection with their official duties. It shall be the duty of the superintendent to detail such Indian policemen as may be necessary to carry out the orders of the Court of Indian Offenses and to preserve order during the court sessions. The superintendent shall investigate all reports and charges of misconduct on the part of Indian policemen and shall exercise such proper disciplinary measures as may be consistent with existing regulations. No superintendent of any Indian reservation shall assign or detail any member of the Indian police force for duty as janitor or chauffeur or for any duty not connected with the administration of law and order.

§ 11.302 Police commissioners.

The superintendent of any Indian reservation may, with the approval of the Commissioner of Indian Affairs, designate as police commissioner any qualified person. Wherever any special or deputy special officer is regularly employed in any Indian jurisdiction, he shall be police commissioner for that jurisdiction. Such police commissioner shall obey the orders of the superintendent of the reservation where employed and shall see that the orders of the Court of Indian Offenses are properly carried out. The police commissioner shall be responsible to the superintendent for the conduct and efficiency of the Indian police under his direction and shall give such instruction and advice to them as may be necessary. The police commissioner shall also report to the superintendent all violations of law or regulation and any misconduct of any member of the Indian police.

§ 11.303 Police training.

It shall be the duty of the superintendent to maintain from time to time as circumstances require and permit classes of instruction for the Indian policemen. Such classes shall familiarize the policemen with the manner of making searches and arrests, the proper and humane handling of prisoners, the keeping of records of offenses and police activities, and with court orders and legal forms and the duties of the police in relation thereto, and other subjects of importance for efficient police duty. It shall further be the purpose of the classes to consider methods of preventing crime and of securing cooperation with Indian communities in establishing better social relations.

§ 11.304 Minimum standards for police programs.

The following minimum standards are required of all law enforcement programs that receive funding from the Bureau of Indian Affairs:

(a) Each law enforcement officer shall be specifically identified as such and shall be individually authorized to make arrests and carry firearms. Only employees assigned duties as law en-

forcement officers and qualified under paragraph (e) of this section may be authorized to carry firearms or make arrests.

(b) Uniforms, when worn, shall positively identify the wearer as a law enforcement officer. Badge, name plate and tribal or Bureau of Indian Affairs patch shall be visible at all times. Uniforms of all enforcement personnel shall be plainly distinguishable from the uniforms of any non-enforcement personnel working on the reservation. Each officer shall be issued a standard identification card bearing a photograph of the officer.

(c) A firearm may be discharged only when in the considered judgment of the officer there is imminent danger of loss of life or serious bodily injury to the officer or to another person. The weapon may be fired only for the purpose of rendering the person at whom it is fired incapable of continuing the activity prompting the officer to shoot. The firing of warning shots is prohibited. This policy does not apply to the use of firearms to participate in official marksmanship training or to kill a dangerous or seriously injured animal.

(d) Except in firearms training, each time a firearm is used for law enforcement purposes a report shall be filed with the superior of the officer who used the weapon. Whenever use of a weapon results in serious injury or death of any person, the officer firing the weapon shall be placed on administrative leave, or be assigned to strictly administrative duties pending a thorough investigation of all circumstances surrounding the incident.

(e) Each law enforcement officer must have attained a score of 70 percent or better on an approved firearms qualification course within the previous six months to be qualified to carry a firearm. Whenever an officer's firearms qualification lapses, the officer shall return all weapons issued. The following courses are approved firearms qualification courses:

(1) The National Rifle Association National Police Course.

(2) The National Rifle Association 25-Yard Course.

(3) The National Rifle Association Practical Pistol Course.

(4) The Federal Bureau of Investigation Practical Pistol Course.

(f)(1) Law enforcement officers shall be issued the standard police .38 caliber revolver and ammunition. The use of other types of hand guns such as automatics, parabellums, or calibers other than the authorized .38 caliber is prohibited. The barrel length may be not more than 6 inches nor less than 4 inches for uniformed personnel, and not less than 2 inches for plainclothes personnel. Only standard load ammunition may be used. Bureau of Indian Affairs officers who carried a .357 Magnum revolver while performing law enforcement functions for the Bureau of Indian Affairs before July 17, 1972, may be authorized to carry a .357 Magnum revolver. The Commissioner of Indian Affairs may grant a written waiver to permit Bureau of Indian Affairs officers to carry hand guns not authorized by this paragraph.

(2) Each tribe shall specify the type of firearms, ammunition and auxiliary equipment to be used by the law enforcement officers of that tribe.

(g)(1) Newly employed patrol officers shall successfully complete within their first year of service the approved Basic Police Training Course conducted at the Indian Police Academy or a similar course substantially meeting or exceeding the level of training provided by the Indian Police Academy and approved by the Commissioner of Indian Affairs. An officer who fails to complete the training required by this paragraph shall be discharged or transferred to a position not involving law enforcement duties. Transfer may result in demotion.

(2) Prior to, or within one year after, promotion or appointment to a supervisory enforcement position, an employee shall complete the approved Supervisory Enforcement Officer Training Course conducted at the Indian Police Academy or a similar course substantially meeting or exceeding the level of training provided by the Indian Police Academy and approved by the Commissioner of Indian Affairs. An officer who is serving in a supervisory position and fails to complete the training required in this paragraph shall be transferred to a

nonsupervisory position. Transfer may result in demotion.

(3) Prior to, or within one year after, promotion or appointment to a criminal-investigator position, an officer shall successfully complete the Criminal-Investigator Training Course conducted at the Indian Police Academy or a similar course substantially meeting or exceeding the level of training provided by the Indian Police Academy and approved by the Commissioner of Indian Affairs. An officer who is serving in a criminal-investigator position and fails to complete the training required in this paragraph shall be transferred to a noncriminal-investigator position. Transfer may result in demotion.

(4) Prior to, or within one year after, promotion or appointment to a supervisory criminal-investigator position, an officer shall successfully complete the Executive Management Course of Training conducted at the Indian Police Academy or a similar course substantially meeting or exceeding the level of training provided by the Indian Police Academy approved by the Commissioner of Indian Affairs. An Officer who is serving in a supervisory criminal-investigator position and fails to complete the training required in this paragraph shall be transferred to a nonsupervisory criminal-investigator position. Transfer may result in demotion.

(h) Each law enforcement officer shall receive a minimum of forty hours of local in-service training annually to meet training needs determined by the tribe and to keep abreast with developments in the field of law enforcement.

(i) The Civil Service Commission accepted Bureau of Indian Affairs standards for skill level GS-083 are the minimum entry level qualifications for a patrol officer. The Civil Service Commission standards for skill level GS-1811 are the minimum entry level qualifications for criminal investigators. The standards are available for inspection or copying at any Bureau, Agency, Area, or Central Personnel Office.

(j) Salaries paid law enforcement officers by a tribal organization under a contract under Part 271 of this chapter or by a tribal governing body under a grant under Part 272 of this chapter shall be equal to or greater than the salaries paid officers with similar responsibilities employed directly by the Bureau of Indian Affairs.

(k) Prior to taking an adverse action against any employee, the contractor under Part 271 of this chapter or grantee under Part 272 of this chapter shall take the following steps:

(1) Notify the employee of the contemplated action and give a full specification of the reasons such action is contemplated.

(2) Provide the employee with a written statement of any specific violation of rules, regulations, or statutes the contractor or grantee alleges the employee has committed and the names of all persons upon whose testimony these allegations are based.

(3) Set a hearing date not less than 15 days after the employee has been given the written statement of allegation.

(4) Provide the employee and the employee's counsel at the hearing with an opportunity to confront and cross-examine each adverse witness.

(5) Provide the employee and the employee's counsel at the hearing with an opportunity to delineate issues, to present factual contentions in an orderly manner and to generally protect the employee's interest.

(6) Reconsider the decision to take the adverse action based solely on the evidence given at the hearing and provide the employee at the time the decision is announced with a written statement of the reasons for the decision and the evidence relied upon in reaching the decision.

(7) Issue a final order based on the decision reached after the hearing.

(l) After October 1, 1977, the tribe shall require each law enforcement officer it employs to adhere to a law enforcement code of conduct prescribed by the tribe. The code shall establish specific rules concerning conflicts of interest, employee conduct both on and off duty, impartiality and thoroughness in performance of duty, and acceptance of gifts or favors.

(m) A contractor under Part 271 of this chapter shall use the same report forms and submit the same statistical

reports to the Central Office that are required of Bureau of Indian Affairs police programs.

(n)(1) When a law enforcement officer receives an oral or written allegation that a law enforcement officer employed by a program funded by the Bureau of Indian Affairs has violated the civil rights of any person, the officer receiving the allegation shall prepare a written report of the allegation and transmit it through the chain of command to the chief law enforcement officer within seven days of receipt of the allegation.

(2) Not later than seven days after being notified of the allegation, the chief law enforcement officer shall take the following actions:

(i) Notify the Federal Bureau of Investigation, the agency superintendent or contracting officer's representative, and the tribal council. The notice to the Federal Bureau of Investigation shall state whether an investigation is being conducted to determine whether tribal law was violated and shall cite any relevant provisions of the tribal code.

(ii) If the officer against whom the allegation is made is an employee of the Bureau of Indian Affairs, prepare a memorandum to the superintendent, who shall, through the area director and the Assistant Secretary—Indian Affairs, transmit to the Director, Office of Audit and Investigation, a request that the allegation be investigated to determine whether any administrative action is warranted. The memorandum shall be transmitted through the superintendent and the area director. The tribal council shall receive a copy of any such memorandum.

(iii) If the officer against whom the allegation is made is an employee of a tribal contractor, notify both the top Bureau of Indian Affairs law enforcement officer assigned to the agency and the tribal council. If there is no Bureau of Indian Affairs law enforcement officer at the agency, the superintendent and the area special officer shall be notified.

(3) If the chief law enforcement officer is accused of a civil rights violation, the report of the allegation shall be transmitted directly to the agency superintendent, who shall take the actions required by paragraph (n)(2) of this section. If there is no agency superintendent, the report of the allegation shall be transmitted directly to the area director, who shall take the actions required by paragraph (n)(2) of this section.

(4) As soon as all actions required by paragraphs (n) (1), (2), and (3) of this section have been completed, a copy of all documents concerning the allegation shall be transmitted to the Chief, Division of Law Enforcement Services, in the Central Office.

(5 U.S.C. 301, 25 U.S.C. 2, 450m)

[41 FR 47234, Oct. 28, 1976; 41 FR 51012, Nov. 19, 1976, as amended at 42 FR 46518, Sept. 16, 1977; 43 FR 16973, Apr. 12, 1978]

§ 11.305 Minimum standards for detention programs.

Each detention program that receives funds from the Bureau of Indian Affairs shall meet the following minimum standards:

(a) No sick or injured person may be booked or held in a detention facility unless a medical release has been obtained from a medical officer.

(b) Any inmate requiring medical attention shall be treated as soon as possible.

(c) The jailor or other responsible employee shall maintain control over the custody and issue of all medicine to prisoners under treatment for chronic ailments to insure proper use and to guard against overdose.

(d) Routine inspections of all cells shall be conducted every thirty (30) minutes to protect the safety and welfare of prisoners. A record of each inspection shall be logged in appropriate records.

(e) Only persons who have been specifically authorized by the jailor to visit a prisoner or prisoners may be allowed in the cell block areas.

(f) Special attention shall be given to cells occupied by persons jailed for intoxication to guard against the infliction of personal injury.

(g) No juvenile may be kept in the same cell with any adult.

(h) Each prisoner shall be served three nutritionally adequate meals a day.

(i) Each foodhandler shall be given a medical examination and, if training in foodhandling is available locally from the Indian Health Service, shall complete the foodhandler training offered by the Indian Health Service prior to employment.

(j) All jail facilities including kitchens shall be subject to periodic inspections by personnel from the Indian Health Service or other appropriate agency to insure proper sanitary conditions.

(k) The number of persons in each cell may not exceed the number for which the cell was designed.

(l) A record of all visitors shall be maintained indicating date, time and identity of each visitor.

(m) Proper precautions shall be taken to insure the safekeeping of property belonging to inmates.

(n) Prior to, or within six months after, promotion or appointment to a position involving detention/jail duties, an employee shall successfully complete a Detention/Jail Operations and Management Training Course approved by the Commissioner of Indian Affairs. An employee who is serving in a position involving detention/jail duties and fails to complete the training required by this paragraph shall be transferred to a position not involving detention/jail or law enforcement duties or discharged. Transfer may result in demotion.

(5 U.S.C. 301, 25 U.S.C. 2, 450k)

[41 FR 47235, Oct. 28, 1976, as amended at 42 FR 46518, Sept. 16, 1977]

§ 11.306 Return of equipment.

Upon the resignation, death or discharge of any member of the Indian police all articles or property issued him in connection with his official duties must be returned to the superintendent or his representative.

87-950

Supreme Court, U.S.
FILED
DEC 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

RED LAKE BAND OF CHIPPEWA INDIANS, et al.
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL APPENDIX

TERENCE L. THATCHER
Counsel of Record

M. FRANCES AYER
PIRTLE, MORISSET, SCHLOSSER & AYER
1000 Second Avenue, Suite 1500
Seattle, Washington 98104-1046
(206) 386-5200
Attorneys for Petitioners Red Lake Band of Chippewa Indians, et al.

Of Counsel:

JAMES F. BODIN
Edwards, Edwards & Bodin
312 Alworth Building
Duluth, Minnesota 55802.
(218) 727-7431

SUPPLEMENTAL APPENDIX

Selected Portions

Bureau of Indian Affairs Regulations, Law and Order on Indian Reservations

TABLE OF CONTENTS

	Page
1.25 C.F.R. § 11.1	1
2.25 C.F.R. § 11.3	3
3.25 C.F.R. § 11.4	4
4.25 C.F.R. § 11.11	4
5.25 C.F.R. § 11.22	5

25 C.F.R. § 11.1

§ 11.1 Application of regulations.

(a) Except as otherwise provided in this part, §§ 11.1 through 11.87 of this part apply to the following Indian reservations:

(1) Omaha (Nebraska).

(2) Flandreau (South Dakota).

(3) Yankton (South Dakota).

(4) Wind River (Wyoming).

(5) Bois Forte (Minnesota).

(6) Red Lake (Minnesota).

(7) Cocopah (Arizona).

(8) Kaibab (Arizona).

(9) Hopi (Arizona) (Tribal court enforcement of special grazing regulations).

(10) Fallon (Nevada).

(11) Goshute (Nevada).

(12) Lovelock (Nevada).

(13) Te-Moak (Nevada).

(14) Yomba (Nevada).

(15) Duckwater Shoshone (Nevada).

(16) Kootenai (Idaho).

(17) Shoalwater Bay (Washington).

(18) Hoopa (California) (Jurisdiction limited to special fishing regulations).

(19) Anadarko Area Tribes (Western Oklahoma).

(20) Choctaw (Mississippi).

(21) Eastern Cherokee (North Carolina).

(22) Louisiana Area (Louisiana) (Includes Coushatta and other tribes in the State of Louisiana which occupy Indian country and which accept the application of this part; *provided* that this part shall not apply to any Louisiana tribe other than the Coushatta Tribe until notice of such application has been published in the FEDERAL REGISTER.)

(b) It is the purpose of the regulations in this part to provide adequate machinery of law enforcement for those Indian tribes in which traditional agencies for the enforcement of tribal law and custom have broken down for which no adequate substitute has been provided under Federal or State law.

(c) No court of Indian Offenses will be established on reservations where justice is effectively administered under State laws and by State law enforcement agencies.

(d) The regulations in this part shall continue to apply to tribes organized under the Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461-479), until a law and order code has been adopted by the tribe in accordance with its constitution and by-laws and has become effective; and thereafter §§ 11.3, 11.4, 11.301, 11.302, 11.303, 11.304, 11.305 and 11.306 shall continue in effect as long as the Indian judges and Indian police are paid from appropriations made by the United States or until otherwise directed.

(e) Nothing in this section shall prevent the adoption by the tribal council of ordinances applicable to the individual tribe, and after such ordinances have been approved by the Secretary of the Interior they shall be controlling, and the regulations of this part which may be in-

consistent therewith shall no longer be applicable to that tribe.

25 C.F.R. § 11.3
§ 11.3 Judges.

(a) A Court of Indian Offenses established for any reservation or group of reservations shall consist of one or more chief judges, whose duties shall be regular and permanent, and two or more associate judges, who may be called to service when occasion requires, and who shall be compensated on a per diem basis.

(b) Each judge shall be appointed by the Commissioner of Indian Affairs, subject to confirmation by a two-thirds vote of the tribal council.

(c) Each judge shall hold office for a period of 4 years, unless sooner removed for cause or by reason of the abolition of the said office, but shall be eligible for reappointment.

(d) A person shall be eligible to serve as judge of a Court of Indian Offenses only if he (1) is a member of a tribe under the jurisdiction of the said court; and (2) has never been convicted of a felony, or, within 1 year then last past, of a misdemeanor.

(e) No judge shall be qualified to act as such in any case wherein he has any direct interest or wherein any relative by marriage or blood, in the first or second degrees, is a party.

(f) On any reservation where no permanent Court of Indian Offenses has been established under this section, a provisional court may be established, with powers equal to those of a permanent court. Such court shall be established by detailing a judge from another reserva-

tion, upon request of the tribal council of the reservation desiring his services. Such detail shall be made by the superintendent of the reservation where the judge regularly presides: *Provided*, That where the judge to be detailed is paid from tribal funds the consent of the tribal council of such tribe shall be obtained for the detail. No detail shall extend beyond 1 year, but any detail may be renewed for additional periods unless such renewal is disapproved by the tribal council which requested or approved the detail.

25 C.F.R. § 11.4

§ 11.4 Removal of Judges.

Any judge of the Court of Indian Offenses may be suspended, dismissed or removed, by the Commissioner of Indian Affairs, for cause, upon the recommendation of the tribal council.

25 C.F.R. § 11.11

§ 11.11 Records.

Each Court of Indian Offenses shall be required to keep, for inspection by duly qualified officials, a record of all proceedings of the court, which record shall reflect the title of the case, the names of the parties, the substance of the complaint, the names and addresses of all witnesses, the date of the hearing or trial, by whom conducted, the findings of the court or jury, and the judgment, together with any other facts or circumstances deemed of importance to the case. A record of all proceedings shall be kept at the agency office, as required by 25 U.S.C. 200.

25 C.F.R. § 11.22

§ 11.22 [Civil] Jurisdiction.

The Court of Indian Offenses shall have jurisdiction of all suits wherein the defendant is a member of the tribe or tribes within their jurisdiction, and of all other suits between members and nonmembers which are brought before the courts by stipulation of both parties. No judgment shall be given on any suit unless the defendant has actually received notice of such suit and ample opportunity to appear in court in his defense. Evidence of the receipt of the notice shall be kept as part of the record in the case. In all civil suits the complainant may be required to deposit with the clerk of the court a fee or other security in a reasonable amount to cover costs and disbursements in the case.

87-950

Supreme Court, U.S.
FILED
DEC 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

RED LAKE BAND OF CHIPPEWA INDIANS, et al.
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL APPENDIX

TERENCE L. THATCHER
Counsel of Record

M. FRANCES AYER
PIRTLE, MORISSET, SCHLOSSER & AYER
1000 Second Avenue, Suite 1500
Seattle, Washington 98104-1046
(206) 386-5200
Attorneys for Petitioners Red Lake Band of Chippewa Indians, et al.

Of Counsel:

JAMES F. BODIN
Edwards, Edwards & Bodin
312 Alworth Building
Duluth, Minnesota 55802.
(218) 727-7431

SUPPLEMENTAL APPENDIX

Selected Portions

Bureau of Indian Affairs Regulations, Law and Order on Indian Reservations

TABLE OF CONTENTS

	Page
1.25 C.F.R. § 11.1	1
2.25 C.F.R. § 11.3	3
3.25 C.F.R. § 11.4	4
4.25 C.F.R. § 11.11	4
5.25 C.F.R. § 11.22	5

25 C.F.R. § 11.1

§ 11.1 Application of regulations.

(a) Except as otherwise provided in this part, §§ 11.1 through 11.87 of this part apply to the following Indian reservations:

(1) Omaha (Nebraska).

(2) Flandreau (South Dakota).

(3) Yankton (South Dakota).

(4) Wind River (Wyoming).

(5) Bois Forte (Minnesota).

(6) Red Lake (Minnesota).

(7) Cocopah (Arizona).

(8) Kaibab (Arizona).

(9) Hopi (Arizona) (Tribal court enforcement of special grazing regulations).

(10) Fallon (Nevada).

(11) Goshute (Nevada).

(12) Lovelock (Nevada).

(13) Te-Moak (Nevada).

(14) Yomba (Nevada).

(15) Duckwater Shoshone (Nevada).

(16) Kootenai (Idaho).

(17) Shoalwater Bay (Washington).

(18) Hoopa (California) (Jurisdiction limited to special fishing regulations).

(19) Anadarko Area Tribes (Western Oklahoma).

(20) Choctaw (Mississippi).

(21) Eastern Cherokee (North Carolina).

(22) Louisiana Area (Louisiana) (Includes Coushatta and other tribes in the State of Louisiana which occupy Indian country and which accept the application of this part; *provided* that this part shall not apply to any Louisiana tribe other than the Coushatta Tribe until notice of such application has been published in the FEDERAL REGISTER.)

(b) It is the purpose of the regulations in this part to provide adequate machinery of law enforcement for those Indian tribes in which traditional agencies for the enforcement of tribal law and custom have broken down for which no adequate substitute has been provided under Federal or State law.

(c) No court of Indian Offenses will be established on reservations where justice is effectively administered under State laws and by State law enforcement agencies.

(d) The regulations in this part shall continue to apply to tribes organized under the Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461-479), until a law and order code has been adopted by the tribe in accordance with its constitution and by-laws and has become effective; and thereafter §§ 11.3, 11.4, 11.301, 11.302, 11.303, 11.304, 11.305 and 11.306 shall continue in effect as long as the Indian judges and Indian police are paid from appropriations made by the United States or until otherwise directed.

(e) Nothing in this section shall prevent the adoption by the tribal council of ordinances applicable to the individual tribe, and after such ordinances have been approved by the Secretary of the Interior they shall be controlling, and the regulations of this part which may be in-

consistent therewith shall no longer be applicable to that tribe.

25 C.F.R. § 11.3
§ 11.3 Judges.

(a) A Court of Indian Offenses established for any reservation or group of reservations shall consist of one or more chief judges, whose duties shall be regular and permanent, and two or more associate judges, who may be called to service when occasion requires, and who shall be compensated on a per diem basis.

(b) Each judge shall be appointed by the Commissioner of Indian Affairs, subject to confirmation by a two-thirds vote of the tribal council.

(c) Each judge shall hold office for a period of 4 years, unless sooner removed for cause or by reason of the abolition of the said office, but shall be eligible for reappointment.

(d) A person shall be eligible to serve as judge of a Court of Indian Offenses only if he (1) is a member of a tribe under the jurisdiction of the said court; and (2) has never been convicted of a felony, or, within 1 year then last past, of a misdemeanor.

(e) No judge shall be qualified to act as such in any case wherein he has any direct interest or wherein any relative by marriage or blood, in the first or second degrees, is a party.

(f) On any reservation where no permanent Court of Indian Offenses has been established under this section, a provisional court may be established, with powers equal to those of a permanent court. Such court shall be established by detailing a judge from another reserva-

tion, upon request of the tribal council of the reservation desiring his services. Such detail shall be made by the superintendent of the reservation where the judge regularly presides: *Provided*, That where the judge to be detailed is paid from tribal funds the consent of the tribal council of such tribe shall be obtained for the detail. No detail shall extend beyond 1 year, but any detail may be renewed for additional periods unless such renewal is disapproved by the tribal council which requested or approved the detail.

25 C.F.R. § 11.4

§ 11.4 Removal of Judges.

Any judge of the Court of Indian Offenses may be suspended, dismissed or removed, by the Commissioner of Indian Affairs, for cause, upon the recommendation of the tribal council.

25 C.F.R. § 11.11

§ 11.11 Records.

Each Court of Indian Offenses shall be required to keep, for inspection by duly qualified officials, a record of all proceedings of the court, which record shall reflect the title of the case, the names of the parties, the substance of the complaint, the names and addresses of all witnesses, the date of the hearing or trial, by whom conducted, the findings of the court or jury, and the judgment, together with any other facts or circumstances deemed of importance to the case. A record of all proceedings shall be kept at the agency office, as required by 25 U.S.C. 200.

25 C.F.R. § 11.22

§ 11.22 [Civil] Jurisdiction.

The Court of Indian Offenses shall have jurisdiction of all suits wherein the defendant is a member of the tribe or tribes within their jurisdiction, and of all other suits between members and nonmembers which are brought before the courts by stipulation of both parties. No judgment shall be given on any suit unless the defendant has actually received notice of such suit and ample opportunity to appear in court in his defense. Evidence of the receipt of the notice shall be kept as part of the record in the case. In all civil suits the complainant may be required to deposit with the clerk of the court a fee or other security in a reasonable amount to cover costs and disbursements in the case.

No. 87-950

Supreme Court, U.S.
FILED
FEB 16 1988
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

RED LAKE BAND OF CHIPPEWA INDIANS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Arizona v. *Manypenny*, 451 U.S. 232 (1981) 8
Arizona v. *San Carlos Apache Tribe*, 463 U.S. 545 (1983) 3
Iowa Mutual Ins. Co. v. *LaPlante*, No. 85-1589 (Feb. 24, 1987) 5
Kissinger v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980) 4
Lone Wolf v. *Hitchcock*, 187 U.S. 553 (1903) 4
Minneapolis Star & Tribune Co. v. *United States Dep't of Interior*, No. 4-85 Civ. 1255 (D. Minn. 1985) 1
Minnesota v. *United States*, 305 U.S. 382 (1939) 6
National Farmers Union Ins. Co. v. *Crow Tribe of Indians*, 471 U.S. 845 (1985) 3, 5
Oliphant v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978) 4, 7
Santa Clara Pueblo v. *Martinez*, 436 U.S. 49 (1978) 3, 4, 7
Three Affiliated Tribes of the Fort Berthold Reservation v. *Wold Engineering*, 467 U.S. 138 (1984) 5
United States v. *Cherokee Nation*, No. 85-1940 (Mar. 31, 1987) 4
United States v. *Clapox*, 35 F. 575 (D. Or. 1888) 7
United States v. *Mississippi*, 380 U.S. 128 (1965) 2, 4
United States v. *Mottaz*, 476 U.S. 834 (1986) 4
United States v. *Texas*, 143 U.S. 621 (1892) 4
United States v. *United Mine Workers*, 330 U.S. 258 (1947) 6
United States v. *Wheeler*, 435 U.S. 313 (1978) 4
United States v. *White Mountain Apache Tribe*, 784 F.2d 917 (9th Cir. 1986) 5, 6
United States v. *Yakima Tribal Court*, 806 F.2d 853 (9th Cir. 1986), cert. denied, No. 86-1425 (May 26, 1987) ... 5, 6
Washington v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) 3, 4
West Virginia v. *United States*, No. 85-937 (Jan. 13, 1987) 4
Williams v. *Lee*, 358 U.S. 217 (1959) 5, 6
Youakim v. *Miller*, 425 U.S. 231 (1976) 5

Statutes and regulations:	Page
Federal Records Act, 44 U.S.C. (Supp. III) 3106	1, 4
Indian Reorganization Act of 1934, 25 U.S.C. (& Supp. IV) 461-479	3
5 U.S.C. 552	1
25 U.S.C. 2	7, 8
25 U.S.C. 13	8
28 U.S.C. 1345	6
25 C.F.R.:	
Pt. 11	2, 7
Section 11.1(a) (1977)	7
Section 11.1(a) (1986)	7
Section 11.1(a)	7
Section 11.1(a)(6)	2
Section 11.1(b)	7
Section 11.1(d)	3
Section 11.1(e)	8
Section 11.2	7
Section 11.3	7
Section 11.4	7
Section 11.10	2, 8
Section 11.11	2, 8
Section 11.22	7
Section 11.22C	7
Section 11.30 *et seq.*	7
Miscellaneous:	
47 Fed. Reg. 22093 (1982)	2, 7

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-950

RED LAKE BAND OF CHIPPEWA INDIANS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the courts below erred in ordering them to return to the Federal Government the records of a Court of Indian Offenses established by the Bureau of Indian Affairs (BIA).

1. a. The United States brought this action against the Red Lake Band of Chippewa Indians, the Red Lake Tribal Council, and the members of the Council under the Federal Records Act, 44 U.S.C. (Supp. III) 3106 (Pet. App. 24), to recover certain records of the Court of Indian Offenses on the Red Lake Indian Reservation in Minnesota ("Red Lake Court") (*id.* at 3). The Tribe had removed the records to the tribal archives in August 1985 and thereafter refused to return them to the BIA (*ibid.*).[1]

[1] The BIA sought the records after a newspaper sued for access to them under the Freedom of Information Act (FOIA), 5 U.S.C. 552. The district court dismissed the FOIA case without prejudice because BIA did not possess the records. *Minneapolis Star & Tribune Co.* v. *United States Dep't of Interior*, No. 4-85 Civ. 1255 (D. Minn. 1985).

The district court granted the United States' motion for summary judgment (Pet. App. 10-23). The court first rejected the Tribe's claim of sovereign immunity to suit, explaining that the "assertion of jurisdiction over this case does not repudiate the right of Indian tribes to sovereign immunity, but simply recognizes that such sovereign immunity does not work as against the United States" (*id.* at 13). On the merits, the court held that the records of the Red Lake Court belong to the United States because the Red Lake Court was established by the BIA under 25 C.F.R. Pt. 11, and therefore is a "CFR court," not a tribal court (Pet. App. 18-21). The court emphasized that the Tribe itself had taken the position in 1981 that the Red Lake Court is a CFR court and that BIA had expressly included the Red Lake Reservation under the CFR-court regulations in 1982 in response to the Tribe's contention that it had been improperly omitted (*id.* at 19-21, citing 47 Fed. Reg. 22093 (1982)).

b. The court of appeals unanimously affirmed (Pet. App. 2-9). The court found it to be "an inherent implication of the superior power exercised by the United States over the Indian tribes that a tribe may not interpose its sovereign immunity against the United States. * * * * * [J]ust as a state may not assert sovereign immunity as against the federal government, neither may an Indian tribe, as a dependent nation, do so." *Id.* at 6-7, citing *United States* v. *Mississippi,* 380 U.S. 128, 140-141 (1965). On the merits, the court of appeals concluded that because the Red Lake Court is expressly designated by the governing regulations as a CFR court, the Court must comply with the regulations' record-keeping requirements and its records belong to the United States (Pet. App. 7-8, citing 25 C.F.R. 11.1(a)(6), 11.10, 11.11).[2] The court observed

[2] Records of Courts of Indian Offenses are to remain in the BIA's custody for twenty years and are then transferred to the National

that although a CFR court may be reclassified as an independent tribal court and thereby be exempted from, inter alia, the regulations' record-keeping requirements, petitioners failed to establish that the Red Lake Court qualified for that status (Pet. App. 8-9).[3]

c. On December 11, 1987, Justice Blackmun denied petitioners' application for a stay pending certiorari.

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Review therefore is not warranted.

a. Petitioners' contention (Pet. 15-19) that the Tribe's sovereign immunity insulates it from a suit brought by the United States is without merit. Although Indian Tribes possess the common-law immunity from suit traditionally enjoyed by sovereign powers (*Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 60 (1978)), "tribal sovereignty is dependent on, and subordinate to * * * the Federal Government." *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980). As a result, an Indian Tribe possesses only those aspects of sovereignty that have not been withdrawn as a necessary incident of its dependent status (*National Farmers Union Ins. Co.* v. *Crow Tribe of Indians*, 471 U.S. 845, 851-853 (1985)) and are "not 'inconsistent with the overriding interests of the National Government' " (*Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983) (quoting *Colville*, 447 U.S.

Archives (Pet. App. 17, citing BIA, Record Disposal Schedule 172, Supp. 3, Release 1 (2/11/77)).

[3] In order to qualify for the exemption, the Tribe was required to establish both that it was organized under the Indian Reorganization Act of 1934, 25 U.S.C. (& Supp. IV) 461-479, and that it had adopted a law-and-order code in accordance with its constitution and bylaws. See Pet. App. 8, citing 25 C.F.R. 11.1(d).

at 153)). Plainly, the ability of the United States to bring suit against persons who have wrongfully appropriated its property is an "overriding interest of the National Government" to which tribal sovereignty must yield. Congress authorized the Attorney General to bring a suit to recover "any" records that have been unlawfully removed from an agency's custody (44 U.S.C. (Supp. III) 3106; *Kissinger* v. *Reporters Comm. for Freedom of the Press,* 445 U.S. 136, 148 (1980)); there is no exception for situations in which the records were unlawfully removed by an Indian Tribe. Compare *United States* v. *Mottaz,* 476 U.S. 834, 851 (1986).

Moreover, as petitioners concede (Pet. 18-19), it is well-settled that even the "States have no sovereign immunity as against the Federal Government" (*West Virginia* v. *United States,* No. 85-937 (Jan. 13, 1987), slip op. 6; see also *United States* v. *Mississippi,* 380 U.S. 128, 140-141 (1965); *United States* v. *Texas,* 143 U.S. 621, 646 (1892)). It follows *a fortiori* that sovereign immunity does not insulate an Indian Tribe from a suit brought by the United States, because Indian Tribes, unlike the States, are "fully subordinated to the sovereignty of the United States" (*Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191, 211 (1978)) and their sovereign powers are subject to plenary control by the United States. *Santa Clara Pueblo,* 436 U.S. at 56; *United States* v. *Wheeler,* 435 U.S. 313, 323 (1978); *Lone Wolf* v. *Hitchcock,* 187 U.S. 553, 565 (1903). Compare *United States* v. *Cherokee Nation,* No. 85-1940 (Mar. 31, 1987), slip op. 7. And because the authority of the United States to sue any person (including a State or Tribe) in its own courts is a necessary attribute of federal supremacy, it is immaterial that the Tribe might not have consented to such suits. See Pet. 17-18, 19.

The court of appeals' holding that the Tribe is not immune from a suit brought by the United States is consist-

ent with recent decisions of the Ninth Circuit, the only other court of appeals to consider the question. See *United States* v. *White Mountain Apache Tribe,* 784 F.2d 917, 920 (9th Cir. 1986); *United States* v. *Yakima Tribal Court,* 806 F.2d 853, 861 (9th Cir. 1986), cert. denied, No. 86-1425 (May 26, 1987). The Court denied certiorari in the *Yakima* case raising the same issue, and there is no reason for a different disposition here.

b. Petitioners' related contention (Pet. 9-11) that the district court should have referred this controversy to the Red Lake Court does not warrant review. As petitioners concede (Pet. 11 n.5), they did not raise this issue below, and because the issue is not jurisdictional, this Court need not consider it. *Youakim* v. *Miller,* 425 U.S. 231, 234 (1976). In any event, this contention is wrong. Petitioners rely on *National Farmers Union* and *Iowa Mutual Ins. Co.* v. *LaPlante,* No. 85-1589 (Feb. 24, 1987). However, in those cases, the plaintiffs in federal court also were named as defendants in pending suits in tribal court that arose out of the same facts. Here, by contrast, there was no pending suit in the Red Lake Court to which the federal court could have deferred.

To be sure, even where there is no suit pending in tribal court, this Court has held that state courts ordinarily cannot exercise jurisdiction over suits brought by non-Indians against Indians arising out of on-reservation conduct, because such suits would "infringe[ ] on the right of reservation Indians to make their own laws and be ruled by them." *Williams* v. *Lee,* 358 U.S. 217, 220 (1959); see also *Iowa Mutual,* slip op. 5; *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold Engineering,* 467 U.S. 138, 148 (1984). However, nothing in these decisions or the principles they apply suggests that the *United States* cannot bring an action in *federal* court to enforce its rights

under *federal* law. Compare *United States* v. *United Mine Workers,* 330 U.S. 258, 272-273 (1947). As we have explained above, such access by the United States to its own courts is at least presumptively an attribute of federal sovereignty and supremacy. And Congress in fact has conferred jurisdiction on the district courts over "*all* civil actions, suits or proceedings commenced by the United States" (28 U.S.C. 1345 (emphasis added)), thereby manifesting an intention that the United States have access to its own courts to protect its interests. There is no exception to this grant of jurisdiction for suits brought against Indian Tribes. Cf. *Minnesota* v. *United States,* 305 U.S. 382, 389-390 (1939). Especially where, as here, the United States sues to enforce its rights under a federal statute, the suit does not impermissibly interfere with "the right of reservation Indians to make their own laws and be ruled by them" (*Williams* v. *Lee,* 358 U.S. at 220), because the Indians' right of self-government is subordinate to the sovereign powers of the United States, including the statutes passed by Congress.

The Ninth Circuit recently rejected a similar argument that the United States should be required to exhaust its remedies in tribal court before bringing an action against an Indian Tribe in federal court. See *White Mountain Apache Tribe,* 784 F.2d at 920 n.10; *Yakima Tribal Court,* 806 F.2d at 860-861. As noted above (see page 5, *supra*), the Court denied certiorari in the *Yakima* case, and there is no reason for a different result here, especially because petitioners (unlike the petitioners in *Yakima*) failed to raise the issue below.

c. On the merits, this case raises an issue of first impression concerning the status of records generated by a CFR court. That issue turns on the interpretation of BIA regulations and is of narrow and diminishing importance.

For these reasons, this case plainly does not warrant review on the merits.[4]

In any event, both courts below correctly concluded, on the basis of their thorough review of the governing regulations, that the Red Lake Court is an establishment of the BIA and that its records therefore belong to the BIA. CFR courts, also known as Courts of Indian Offenses, were created by the Federal Government and are entirely governed by the regulations in 25 C.F.R. Pt. 11. See *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. at 196 n.7. The Commissioner of Indian Affairs authorized the creation of these courts beginning in the 1880's, pursuant to the authority now codified in 25 U.S.C. 2 to promulgate regulations for the management of Indian affairs. *United States* v. *Clapox*, 35 F. 575, 577 (D. Or. 1888). The Red Lake Court was established under that authority in 1884. 47 Fed. Reg. 22093 (1982). The purpose of these courts was and is to fill a vacuum created by the breakdown of traditional tribal mechanisms for the enforcement of tribal law and custom on particular reservations. See 25 C.F.R. 11.1(b); *Santa Clara Pueblo*, 436 U.S. at 64 n.17. The current regulations specify which reservations shall have CFR courts (25 C.F.R. 11.1(a)); govern the appointment and removal of judges (25 C.F.R. 11.3, 11.4); set forth the jurisdiction of the CFR courts (25 C.F.R. 11.2, 11.22, 11.22C) and the substantive law to be applied (25 C.F.R. 11.30 *et seq.*); and require records to be kept of all court

---

[4] Of the 127 court systems currently operating on Indian Reservations, only 22 are CFR courts (see 25 C.F.R. 11.1(a)(1986)), a marked decline from the number of CFR courts a decade earlier (see 25 C.F.R. 11.1(a)(1977)). See *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. at 196 n.7. With the approval and encouragement of the Department of the Interior, the remaining CFR courts may eventually begin to operate as traditional tribal courts as well. Thus, issues concerning the ownership of a CFR court's records are of diminishing importance.

proceedings (25 C.F.R. 11.10, 11.11). The BIA funds the CFR courts through annual appropriations from Congress (25 U.S.C. 13).

Contrary to petitioners' contention (Pet. 13-15), the mere fact that the Red Lake Court now applies a law-and-order code adopted by the Tribe as its substantive criminal code does not make the Court itself any less an arm of the BIA—just as the fact that a federal district court might apply the law of a State or foreign country as the substantive rule of decision in a particular case does not make the court any less a part of the United States Government in that case. See, *e.g.*, *Arizona* v. *Manypenny*, 451 U.S. 232, 241 (1981). Indeed, as petitioners appear to acknowledge (Pet. 3), the CFR-court regulations required BIA's approval before the Tribe's law-and-order code could be applied in the Red Lake Court. See 25 C.F.R. 11.1(e). Accordingly, although the substantive law applied in criminal cases involving Indians on the Red Lake Reservation is the product of the Tribe's inherent power to legislate over its own affairs, the power to adjudicate is separately conferred on the Red Lake Court by federal law, through 25 U.S.C. 2 and the CFR-court regulations. For this reason, the Red Lake Court is an arm of the BIA, and the courts below correctly held that the Court's records belong to and must be returned to the BIA.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

FEBRUARY 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60296